88-1911

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH R. COSENTINO, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

A. Where an indictment charges petitioner with participating in a scheme to defraud a governmental agency and others of intangible rights and also intertwines a charge that petitioner also participated in a scheme to defraud a related person of money, and after proof closes, the judge, in a bench trial, makes it clear and announces that his verdict is based upon the intangible right of deprivation, enters judgment thereon, does the trial court have jurisdiction, after appeal is prosecuted and the cause is remanded to determine the effect of *McNally v. United States* on the judgment, to repudiate his prior findings, conclusions, and then to modify the judgment to find petitioner guilty of the money fraud the court rejected prior to judgment?

B. If upon an indictment with intertwined charges the trial court professes to have entered a general finding of guilty on all counts, upon which he has entered judgment, and the Supreme Court declares, thereafter, that two of the charges do not constitute an offense, is petitioner entitled to a reversal upon appeal, and at the least, a new trial?

C. Where petitioner has been subjected to trial upon three intertwined charges of three separate offenses, the trial court's findings establish that petitioner has been adjudged guilty upon a charge declared to state no offense and the Court of Appeals returns the case for a determination of the effect of the decisions voiding the two charges, if the court thereafter declares

petitioner guilty of one of the charges originally rejected by the court, has petitioner been twice put in jeopardy of his liberty in violation of the Constitution?

D. In an indictment and trial where there was no charge or proof introduced that any policyholder, claimant, or creditor of an insurance company sustained a monetary injury due to any activities it was caused to engage in by the defendants charged with injuring it and the proof establishes that the only injured person is one of the defendants who was its sole shareholder, in complete control and its president, while simultaneously leading the defendants in their efforts to save the company involved, and the only injury alleged to any person, other than the controlled corporation, is an intangible rights injury, can that corporation be used to impose criminal liability for injury to it under the mail fraud statute, or, does the imposition of liability establish that the corporate fiction is being used to circumvent the decision in *McNally v. United States*?

E. If the presumption of innocence is rejected, the tripartite subdivision of our federal government eroded, the foundation of our federal system rejected, ultimately causing petitioner to be found guilty upon a record barren of evidence he "intended" to participate in a fraud and upon a charge not levied against him, should his conviction stand?

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To the Honorable Chief Justices and the Associate Justices of the Supreme Court of the United States, your petitioner, Joseph R. Cosentino, Sr., by his counsel, Mitchell H. Caplan, respectfully represents that:

OFFICIAL AND UNOFFICIAL REPORTS INVOLVED

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit are as yet unpublished. Both the judgment and the opinion are printed in the Appendix separately filed herewith, Judgment, p. B-1; Opinion, p. A-1.

The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division denying petitioner's application for relief pursuant to Title 28 U.S.C., sec. 2255 is unpublished. A copy is printed in the Appendix at p. D-1.

The judgment entered by the District Court on December 4, 1986 is unpublished; it is printed in the Appendix, p. E-1.

The oral verdict and explanation of the District Court upon which he rendered judgment is not published but is printed at p. F-1 of the Appendix.

BASIS OF JURISDICTION

The indictment in this case charged an offense under Title 18 U.S.C., sec. 1341 (as amend. 1970) within the district and division of the United States District Court for the Northern District of Illinois, Eastern Division whose jurisdiction was founded upon Title 18 U.S.C., sec. 3231 (1949).

Final judgment in the District Court was rendered on December 4, 1986. Appeal was taken on December 14, 1986 to the United States Court of Appeals for the Seventh Circuit whose jurisdiction was founded upon Title 28 U.S.C., sec. 1291 and Title 28 U.S.C., sec. 1294.

The Court of Appeals remanded the cause to the District Court to determine the effect, if any, of *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875 (1987) on the cause. Jurisdiction to remand was founded upon Title 28 U.S.C., sec. 2106. Thereafter, the cause was returned to the Court of Appeals whose jurisdiction remained founded upon Title 28 U.S.C., sec. 1291.

The United States Court of Appeals affirmed the judgment on February 8, 1989 and denied petitioner's rehearing on March 22, 1989. This Court's jurisdiction is founded upon Title 28 U.S.C., sec. 1254(1).

CONSTITUTIONAL RULES AND STATUTES INVOLVED

The following provisions, statutes, court rules, and constitutional provisions are involved:

U.S. Const., Amend. V
Title 18 U.S.C., sec. 1341 (as amend. 1970)
Title 28 U.S.C., sec. 2106 (1949)
Title 28 U.S.C., sec. 2241 (as amend. 1966)
Title 28 U.S.C., sec. 2255 (1948)

The aforesaid constitutional rules and statutory provisions are lengthy and are therefore printed in the Appendix.

STATEMENT OF THE CASE

The indictment in this case was returned in the Northern District of Illinois, Eastern Division on September 6, 1986 charging petitioner and his co-defendants with an offense under Title 18 U.S.C., sec. 1341 (as amend. 1970) (mail fraud) in that district and division. The Court's jurisdiction was based upon Title 18 U.S.C., sec. 3231.

Paragraphs 10. a. 1 and 10. a. 2 of the indictment charged the defendants with having participated in a scheme to de-

fraud the policyholders and claimants of Kenilworth Insurance Company (hereinafter referred to as Kenilworth) of those fiduciary duties the defendants owed them, through the use of the mails (App. pp. G-1 to G-3).

Paragraph 10. b. charged petitioner and his co-defendants with participating with the use of the mails in a scheme to defraud the Illinois Department of Insurance (hereinafter referred to as the Department) by preventing its right to regulate the insurance industry in Illinois for the benefit of the public, and for the benefit of Kenilworth's claimants and policyholders (App. p. G-3).

Paragraph 10. c. charged the defendants with having participated in a scheme to use the mails "to obtain money by means of false and fraudulent pretenses and representations" (App. p. G-3). Paragraph 26 alleged that the basis of the scheme was "(to) operate Kenilworth for the purpose of . . . improperly converting insurance . . . premiums" (App. p. G-6).

Petitioner, a licensed insurance broker for some twenty-five years, specialized in surety contracts, knowing practically nothing of other insurance fields. His co-defendants were:

1. Chester Mitchell, Kenilworth's president, its sole shareholder and that person who was in complete control of it and of its activities. In addition, Mitchell was not only a participant in the joint venture which became involved in the case but in reality its leader.
2. Jack Geopfert, supposedly a commercial casualty insurance expert who did produce a great deal of premium business for Kenilworth and a reinsurance treaty that reinsured Kenilworth 100% against loss on policies issued and covered by the treaty.
3. Robert Patterson, who was a Kenilworth agent. He, together with his wife, owned a dormant insurance corporation we will call Robco which he, by oral

agreement of all defendants, dedicated to the production of commercial insurance premium for the benefit of Kenilworth. Mitchell permitted Robco to act as an agent without a contract in order to secure Kenilworth premium from commercial insurance policy sales, a new business for it, in an effort to bring Kenilworth out of its financial skid produced by the "cut throat" nature of its primary business automobile casualty. While Mitchell controlled all of Kenilworth's activities, including those defendants participated in, because he controlled Kenilworth's allowing or withdrawing permission to represent it, Patterson controlled Robco, including its money receipts and the distribution of that money.

In addition to the above evidence adduced at the trial, the prosecution also introduced evidence that:

a. Before the defendants joined together in their attempt to save Kenilworth, petitioner, at Mitchell's urging, arrived at an oral purchase agreement with one Milton Law to purchase all of his stock in Kenilworth for $250,000. Shortly after the venture here began, that oral agreement was reduced to writing, $50,000 paid down and $200,000 due by December 1, 1981. The written contract was not reported to the Department.

Petitioner was financially unable to complete the contract, and it was taken over by Mitchell who did complete it, sought and obtained Department approval of that purchase. Petitioner never had physical possession or control of the stock and was never a director, employee, or agent of Kenilworth. He was an agent for his wife's insurance agency who in turn was an agent of Kenilworth for surety, and he, for that agency, produced about $75,000 per month in premium for Kenilworth without concomitant loss.

b. Petitioner brought the defendants together because Mitchell wanted to bring Kenilworth into the commercial

insurance business. Geopfert produced the reinsurance treaty that made it feasible for Kenilworth to write sizeable amounts of such insurance.

c. Kenilworth had neither the staff nor expertise to handle such business or its production, nor, did it have the physical facility to do so. That's why Patterson's Robco was used. Between Geopfert and his employees and Patterson and his employees, there was sufficient people and knowledge to handle the business which began in September 1981.

d. By November 28, 1981, substantial premium had been produced for Kenilworth and substantial commissions earned, yet, the parties had no agreement among them on how to share wealth. They met on that day and agreed upon a weekly draw and how profits emanating from earned commission would be distributed. It was decided that each—petitioner, Geopfert, Mitchell, and Patterson—would receive at present $2,000 per week. Each designed a nominee to receive their checks.

Geopfert testified that he warned the parties that he and his employee, Alan Assael, had both been convicted of felonies.

The agreement reached that day also provided that:

> "Mitchell's stock shall be purchased annually by taking 20% of the 50% profit until he has received $4,000,000."

This was not reported to the Department.

Geopfert also suggested that Kenilworth enter into a Managing General Agency (MGA) agreement with Robco in order to allow it to control the flow of cash and creation of liability in Kenilworth. Nothing was agreed upon.

e. On January 10, 1982, an MGA was entered into between Robco and Kenilworth. Petitioner was not consulted

on its terms, nor, was he told the terms. Petitioner never participated in any of Robco's activities and had no interest in it except as a joint venturer of profits.

The MGA agreement gave Robco a 30% commission—20% to be paid to producers, 10% to cover its work. It assumed a tremendous amount of both paperwork and administrative work for Kenilworth. The reporting features were different, but absent knowledge that the Department required a different reporting of financial condition than the statute demanded for Kenilworth—something petitioner knew nothing of—there was nothing unusual about it given the amount of business being produced.

The contract required all premium—for commercial insurance—to flow through Robco. However, that never happened because almost immediately Mitchell made an imperative non-refusable demand upon Patterson that all premium be paid directly to Kenilworth. Mitchell did, however, agree that Kenilworth would pay the producers and remit 10% of all premium to Robco—premium Robco was producing—because Robco's expenses and costs, except for producers, was not changed by the premium flow.

Kenilworth never remitted the 10%, yet, Robco's expenses continued, including the check to the joint venturers. Mitchell instructed Patterson to pay all necessary money out of those moneys Robco was holding that stemmed from Kenilworth premium collected and that at the end of the accounting period, they would straighten it all out. Patterson did that.

f. During the entire period the enterprise lasted, September 1981 to April 1982, the following is a recapitulation of the income:

1. Kenilworth wrote $13,000,000 plus in auto insurance which the parties had nothing to do with;

2. Robco produced $3,998,000 in premium for Kenilworth which Kenilworth received directly;

3. Robco received $285,000 in premium out of which it paid $57,000 to producers, $20,300 to Kenilworth, leaving it with $203,000. It was entitled, because it had produced the money, to $423,000. It, therefore, was owed $220,000. Patterson had paid out $112,000 to the defendants and the remainder to expenses. All checks to the defendants being issued in the names of their nominees. Petitioner's wife received $31,000 in checks directly from Robco signed by Patterson. Petitioner believed the money so received was profits generated by commissions earned, and he had no reason to suspect otherwise because of both Patterson and Mitchell's knowledge and expertise (Record, pp. 691-692, 705, cross by gov't).

Upon the close of proof, when summation arguments were made, defense counsel in the course of his argument began to address the charge of obtaining money under false and fraudulent pretenses and representations, when the court interrupted saying:

> "THE COURT: I don't think the government has even argued that fraud. . . So I think for purposes of this argument, you do not have to go through that."

This ended the argument. Indeed, the court was correct (Record, pp. 809-810, 822-823, 851).

On October 1, 1986, the court reached a verdict. After detailing defendants concealments which deprived the Department of its regulatory function, the court concluded:

> "The victims in this case are the . . . Department . . . which, because of the concealments, were estopped from performing the type of effective regulation . . . (it) was required to perform . . . as well as the policyholders who were deprived of that regulation. . . For these reasons there will be a finding of guilty. . ."

(App. p. F-3).

Judgment, including incarceration, community services, and probation was entered on December 4, 1986 (App. p. E-1). Notice of Appeal was filed on December 14, 1986.

On September 11, 1987, pursuant to a motion filed by the defendants, while appeal was pending, after this Court's decision in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875 (1987), the Court of Appeals remanded the cause to the District Court to:

> "(determine) . . . the effect, if any, of *United States v. McNally*. . ."

(Motion, App. p. H-1; Order, App. p. J-1).

Thereafter, defendants filed their "Motion to Vacate Judgment and Sentence. . ." (App. p. I-1).

On May 28, 1988, after reviewing the evidence adduced at the trial, the District Court rendered a Memorandum Opinion and Order denying defendants' motion by:

1. Repudiating his oral statement of findings and conclusions because he did not "intend" them as findings and conclusions;
2. Determining that the remand vested in him jurisdiction to redetermine the facts and arrive at new conclusions; and,
3. Basing his new conclusions on the fact that:

   "Although this Court . . . concluded that defendants had deprived the . . . Department of its intangible right to be . . . informed and that the policyholders were in turn deprived of that regulation, it also concludes that Kenilworth . . . was a victim . . . when its premiums . . . were unlawfully withdrawn and disbursed. . . The indictment in this case properly charge(d) defendant(s) . . . with . . . (this) scheme . . . (t)he Government argued this scheme at trial and presented ample evidence at trial. The court . . . (at trial) found that . . . (defendants) . . . participated in

> a scheme to misappropriate . . . premiums, and that Kenilworth was . . . a victim. . ."

(App. pp. D-12, D-13).

The case then returned to the Court of Appeals who affirmed the judgment based wholly on the May 28, 1988 Memorandum Opinion and Order, indeed, adopting the findings and language of that opinion and order over all legal and factual objections raised (App. p. A-1).[1]

REASONS FOR GRANTING THE WRIT

A.

PETITIONER IS BEING DEPRIVED OF HIS LIBERTY UNDER A VOID JUDGMENT IN VIOLATION OF THE CONSTITUTION AND THIS COURT'S DECISIONS.

Paragraphs 10. a. 1 and 10. a. 2 of the indictment charged petitioner with participating in a scheme to defraud Kenilworth's policyholders and claimants of certain fiduciary duties owed to them.

Paragraph 10. b of the indictment charged petitioner with participating in a scheme to defraud the Department of its right to regulate the insurance industry for the public, Kenilworth's policyholders and claimants.

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[1] The original title of the case and the original parties were: United States of America, plaintiff vs. Chester Mitchell, Jr., Robert H. Patterson, Joseph R. Cosentino, Sr. (petitioner), Jack V. Geopfert, and Willard Hayne, United States District Court, Northern District, Illinois, Eastern Division, case number 86 CR 350. While the indictment was twenty-three counts, only eight are here involved. In addition, the defendant Hayne was never involved in the eight counts. The defendants Mitchell and Geopfert plead guilty, petitioner and Patterson waived trial by jury and submitted to a bench trial.

Paragraph 10. c, read with paragraph 26, charged petitioner with a scheme to defraud Kenilworth of money.

The government pressed its case on the intangible rights deprivation as epitomized by some of its argument on summation that:

> "(T)he victims of the scheme to defraud being . . . the . . . Department . . . because they are deprived of their right to regulate . . . but also, the policyholders . . . because they . . . are deprived of the regulation of the . . . Department. . ."

and, finally:

> "(T)he essence of the scheme to defraud, the fraud on the Department. . ."

This emphasis on the intangible rights charges impressed the District Court because when defense counsel began to argue that there was no evidence to support the property deprivation charge, the court interrupted him saying:

> "I don't think the government . . . argued that fraud . . . so I think for purposes of this argument you do not have to go through that."

The government did not dispell that conclusion. This view of the case climaxed on October 1, 1986 with the Court announcing its verdict. After detailing those concealments, which in his opinion prevented the Department from regulating, the court concluded:

> "The victims in this case are the . . . Department . . . which, because of the concealments, were estopped from performing the type of effective regulation that . . . (it) was required to perform . . . as well as the policyholders, who were deprived of that regulation. . ."
>
> * * *
>
> "It is not conceivable that . . . (the defendants) did not . . . know of . . . the fraud that was being perpetrated on the . . . Department . . . and the policyholders. . ."

Accordingly, on December 4, 1986, a judgment of guilty on Counts 1 through 8 was entered. Appeal was prosecuted, and during the pendency of that appeal, this Court handed down its decision in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875 (1987) determining that the mail fraud statute does not encompass within its ambit a deprivation of an "intangible right."

The District Court sitting in this case is a court of limited jurisdiction, deriving its jurisdiction from U.S. Const., Art. III and the congressional enabling act, *Marbury v. Madison*, 1 Crunch. (5 US) 137, 173-180 (1803); *Insurance Corp. v. Compaigne Des Bauxites*, 456 U.S. 694 (1982). Congress vested the District Court with jurisdiction over federal offenses, Title 18 U.S.C., sec. 3231, and a deprivation of an intangible right is not an offense under Title 18 U.S.C., sec. 1341, *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875 (1987), hence, a conviction upon such a charge is void because the court lacked jurisdiction, *In Re Nielsen*, 131 U.S. 176, 182 (1889); *Bowen v. Johnston*, 306 U.S. 19, 23-24 (1938); *United States v. Davis*, 417 U.S. 333 (1974).

Defendants moved the Court of Appeals for an order remanding the cause to the trial court for an investigation into the effect, if any, *McNally* had on the judgment involved; the court entered an order "that the district court shall . . . (make) a determination of the effect, if any, of . . . *McNally*. . .". Hereafter, the defendants filed a "Motion to Vacate Judgment and Sentence. . ." before the district court.

The district court proceeded to review all of the evidence adduced before it at the trial, and then to reassess what it had said both in final argument and at the time of verdict, and concluded that:

> "(O)ne of the goals of defendants' scheme was to misappropriate Kenilworth . . . premiums. Although this Court also concluded that defendants had deprived

> the . . . Department of its intangible right to be fully informed and that the policy holders were in turn deprived of that regulation, it also concludes that Kenilworth . . . was a victim of this scheme when its premiums, which were held in trust by Robco, were unlawfully withdrawn and disbursed in furtherance of this scheme. . ."
>
> "The indictment in this case properly charges defendant(s) . . . with a scheme to defraud Kenilworth . . . of its premiums. The Government argued this scheme at trial and presented ample evidence at trial. The court also found that . . . (defendants) had indeed participated in a scheme to misappropriate . . . premiums, and that Kenilworth was indeed a victim of this scheme in that it was defrauded of its insurance premiums held in trust by Robco."

Defendant's motion was denied. The court revealed its rationale for reconvicting petitioner when it said:

> "(Defendants) pull out of context some comments this Court made during his attorney's closing argument and in delivering its finding of guilty and contends this proves that this court did not find defendants had conspired to defraud Kenilworth of a property interest. Under Fed.R.Crim.P. 23(c), the court need only make a general finding, and only upon request, find the facts specifically. There was no request by either party . . . (t)heretofore, this Court gave a general finding of guilt and did not intend that its 'very brief remarks' should have been taken as a special finding. Because there appears to be no time limit under Fed. R.Crim.P. 23(c) as to findings issued by the judge, this Court sets forth the following findings. . .'

The remand in this case was not made pursuant to the initial clause of Title 28 U.S.C., sec. 2106, based upon the Court of Appeals having affected the judgment, but, rather, upon that sentence of 2106 which "require(d) such further proceedings to be had as may be just under the circumstances."

The court was now required to delve into whether its judgment was entered with jurisdiction or without jurisdiction. *That was its only duty, Rutherford v. United States*, 806 F.2d 1455 (CA. 10, 1986). The statutory basis to test jurisdiction in a federal court rests upon Title 28 U.S.C., sec. 2241 (habeas corpus) or the now more expeditious remedy provided in Title 28 U.S.C., sec. 2255; where jurisdiction is concerned, both statutory remedies and the decisions rendered under them are interchangeable, *Kaufman v. United States*, 394 U.S. 217, 222 (1969). The proceeding before the court was based upon those statutes, *cf. Rodriguez v. United States*, 395 U.S. 327, 331 (1969).

The court's jurisdiction was now very limited—to test jurisdiction only, *In Re Nielsen*, 131 U.S. 176, 182 (1889); *Bowen v. Johnston*, 306 U.S. 19, 23-24 (1938); *Stone v. Powell*, 428 U.S. 465, 474-475 (1978).

The proceeding was not a continuation of the former criminal case but an independent civil suit collaterally attacking the judgment, *Heflin v. United States*, 385 U.S. 415, 418 (1959). The filing of the notice of appeal had divested the trial court of jurisdiction to affect the judgment, *Griggsy v. Provident Consumers Discount Company*, 459 U.S. 56, 58 (1982) and the judgment was itself res judicata, which also divested the trial court of jurisdiction to affect it, permitting correction of errors only by the Court of Appeals, *Federated Department Stores, Inc. v. Moeite, et al.*, 452 U.S. 394, 398 (1981).

The rationale of the restrictions on jurisdiction to test jurisdiction i.e. collateral attack, are based upon the logic that while litigation begins, it must also end, and the sovereign, the public, and the courts are best served by bringing it to an end, *Federated Department Stores, Inc. v. Moeite, et al.*, 452 U.S. 394, 401-402 (1981); *United States v. Addonizio*, 442 U.S. 178, 184-186 (1979) (see par-

ticularly cases cited in n.11, p. 186).) Not only does it encourage finality, but it prevents hindsight from affecting the trial, and, thus, the adversary system as well, *United States v. Sobel*, 314 F.2d 314 (CA. 2, 1963), *cert. denied*, 374 U.S. 857 (1965).

The corollary to these principles is that the district court could not affect the judgment, indeed, the trial court record was frozen, *cf. Federated Department Stores, Inc. v. Moeite, et al.*, 452 U.S. 394 (1981); *Grimes v. United States*, 607 F.2d 6 (CA. 2, 1979). Petitioner's guilt or innocence were not at issue, *United States v. Kastenbaum*, 613 F.2d 86 (CA. 5, 1950). Error committed in the original trial were not at issue and could not be corrected, *United States v. Addozinio*, 442 U.S. 178, 184 (1979); *United States v. Sobel*, 314 F.2d 314 (CA. 2, 1963), *cert. denied*, 374 U.S. 857 (1964). Nor, could the district court *modify, revamp, or in any way correct the original judgment*, *McNally v. Hill*, 293 U.S. 131, 139 (1934); *Smith v. Fitzsimmons*, 264 F.Supp. 728 (S.D. N.Y. 1967), *aff'd*, 394 F.2d 381 (CA. 2), *cert. denied*, 393 U.S. 939 (1968).

The district court had no authority to inquire into the facts to determine if additional liability attached; the district court had no jurisdiction to make new findings and reach new conclusions, so that, in effect, the judgment was modified.

The court attempted to "hedge"—he didn't intend his remarks as findings and he wasn't requested to make the findings, hence, he may repudiate what he said.

While it is true that Title 18 U.S.C., Rule 23(c) states that findings only become mandatory if requested, yet, the courts have recognized that they have the right on their own initiative to make such findings, *e.g., United States v. Figuera*, 337 F.Supp. 645 (S.D. N.Y. 1971) and the circuits have implicitly approved of this procedure

where the trial court sees its need, *Snow v. United States*, 484 F.2d 811 (D.C. App. Div. 1973). Indeed, appellate courts have at times chided the trial courts for their failure to do so on their own initiative, *e.g.*, *Brown v. United States*, 716 F.2d 457 (CA. 7, 1983) (sentence vacated returned to court for findings).

Thus, there is nothing untoward about such findings. The efficacy of findings by the trial court is lodged in its beneficial effect when appellate review is called into play, *Snow v. United States*, 484 F.2d 811 (D.C. App. Div. 1973). Moreover, it protects the defendant's constitutional rights because it allows him to apprise the legal questions involved, as well as the facts at issue, *Cesario v. United States*, 200 F.2d 232, 233 (CA. 1, 1952); *Wilson v. United States*, 250 F.2d 312, 325 (CA. 9, 1958). It has the effect of explaining what the defendant has been found guilty of and also avoids resort to new trials resting upon general verdicts as they are viewed in multi-charged indictment under *Stromberg v. California*, 283 U.S. 359 (1931).

Indeed, petitioner in this case contended that if the trial court was correct—he had rendered a general finding of guilt—then it became impossible for the trier of fact to know whether the conviction rested upon the "intangible right" deprivation or the money allegation, and petitioner was entitled to a reversal. The Court of Appeals rejected that, basing their decision on the premises that the same evidence necessary to convict for one offense was necessary to convict for the other, hence, the "intangible rights" offense allegations were mere "surplusage".

This is a continuation of their philosophy, arrived at since *McNally*, that *Stromberg v. California*, 283 U.S. 359 (1931) and the cases that followed it, *e.g.*, *Williams v. North Carolina*, 317 U.S. 287, 291-292 (1942); *United States v. Carmen*, 577 F.2d 556 (CA. 9, 1978); *United States v.*

Head, 641 F.2d 174 (CA. 7, 1981) should be avoided, apparently to accomplish their social antipathy to those who are really guilty of the intangible rights crime. *Compare*, *United States v. Baranski*, 484 F.2d 556 (CA. 7, 1973); *United States v. Feldman*, 711 F.2d 758 (CA. 7, 1983) *with* *United States v. Wellman*, 830 F.2d 1453 (CA. 7, 1987); *United States v. Bailey*, 859 F.2d 1265 (CA. 7, 1988).

The approach is a narrow view of what *Stromberg* cured. That case recognizes the inherent unfairness of intermeshing two charges in an atmosphere where one or both will affect the jury's social perception. In this day and age when the news media give equal play to "white collar" crimes, as they do to crimes of violence, where insurance companies' rates and actions are bludgeoned and the brunt of consumer group action, referendum, and legislation, it seems hardly likely that a group of untrained lay persons would not be affected by a charge of broken fiduciary duty, prevention of Department regulation—the trained fact trier in this case was.

The refusal, therefore, to apply the rationale of *Stromberg* leaves wide open that basis type of unfairness which erodes constitutional guarantees.

Logic here dictates that the district court found petitioner guilty of mail fraud based upon a deprivation of intangible rights, which is not a mail fraud offense; hence, his judgment is void, and petitioner is entitled to release.

The Circuit Court of Appeals should have immediately discerned that the district court had no jurisdiction to amend its judgment and sua sponte reversed, *Bender v. Williamsport Area School District*, ____ U.S. ____, 106 S.Ct. 1326, 1331-1332 (1986).

Affirming the action in this case has a four-fold effect:

1. It now sets a precedent for review and modification by trial courts seriously affecting judgment final-

ity, heretofore, prohibited by this court and every other circuit;

2. It vitiates the beneficial effect of a sua sponte use of Title 18 U.S.C., Rule 23(c) while also permitting the use of "hindsight" in arriving at disposition of judicial events;

3. It will inhibit the use of both Section 2241 and 2255 relief, which itself is an aid to the appellate process, because prisoners will have to take a chance that an arguable right that now exists is turned around by an overweening desire to sustain one's prior decisions. Moreover, it is only a stone's throw to a new sentence; and,

4. It allows petitioner to be incarcerated under a void judgment simultaneously depriving him of his liberty without due process of law, *cf. Pennoyer v. Neff*, 95 U.S. 733 (1877).

Affirmance has an additional effect.

B.

PETITIONER HAS TWICE BEEN PLACED IN JEOPARDY OF HIS LIBERTY IN VIOLATION OF U.S. CONST. AMEND. V.

Petitioner was charged with three mail fraud offenses. The district court found him guilty of depriving the Illinois Department of Insurance of their right to regulate the insurance industry for the benefit of the public and Kenilworth policyholders.

However, he had also been charged with participating in a scheme to deprive Kenilworth of money. The trial court made no decision, either of guilt or innocence, on that charge, but petitioner was in direct peril of being convicted and punished on that charge. Under these circumstances, the failure to make any finding constituted an "implicit acquittal" of that charge, *Green v. United States*, 355 U.S. 184, 190 (1957).

When the case was returned to the trial court, not upon a remand for a new trial, that court proceeded to again place petitioner in peril of conviction and punishment of the charge of which he already stood "implicitly acquit(ted)" in violation of U.S. Const. Amend. V, *Green v. United States*, 355 U.S. 184 (1957); *United States v. Ewell*, 383 U.S. 116 (1965); *United States v. Beacher Construction Co., Inc.*, 729 F.2d 1278, 1282-1284 (CA. 10, 1984).

This constitutional deprivation is a direct outgrowth of the district court's improper view of its jurisdiction on remand and of the failure of the Court of Appeals to discern the error. Only action from this Court will not only cure the constitutional deprivation but also prevent future such decisions.

C.

THE GOVERNMENT FAILED TO PROVE THE EXISTENCE OF ANY SCHEME TO DEFRAUD ANY PERSON, OR CLASS OF PERSONS, OF ANY MONEY OR PROPERTY.

The district court, upon remand, found that:

> "(I)t was a scheme of the defendants to utilize and operate *Kenilworth* for the purpose of . . . converting to their own use *Kenilworth* . . . premium. . . (A) goal of this scheme was to deprive *Kenilworth* of more than . . . intangible right(s). . . Moreover, the proof at the trial adequately established that a goal of the scheme was to siphon off premium money from *Kenilworth*." (emphasis added)

The Court of Appeals mirrored this sentiment when it said:

> "(I)n the case before us, the scheme to deprive *Kenilworth* and its policyholders and claimants of their (right to fiduciary duties of defendants) was also the

> scheme that deprived *Kenilworth* of sound financial management. The two schemes are one and the same, and both allege conduct prohibited by the mail fraud statute—conduct that bled *Kenilworth* of needed money. . . (I)n misleading the . . . Department . . . the scheme permitted the agency . . . that additional time . . . (to allow) the defendants more time to take *Kenilworth* money from the *Robco* accounts." (emphasis added)

Let us look at undisputable fact. No allegation was made here, or, proof introduced, that any creditor of, claimant of, policyholder of, or the general public was deprived of any property by the events that took place in this case.

The only victim of the amended judgment was "Kenilworth." While Title 18 U.S.C., sec. 1341 does not deal with "persons" but with "mailings," it seems obvious that the victim is conceived of as being a "person," either as an individual or as a member of the public. In this case, the court, after remand, designated "Kenilworth" as that "person."

Kenilworth is a corporation, therefore, it is a "person" only because the legislature has created that fiction, *Black's Law Dictionary*, 5th Ed. p. 1023; *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478-479 (1938).

Now, who was Kenilworth? Mitchell owned all of Kenilworth's stock; Mitchell was its president, Mitchell was in full control of all of its activities; and, Mitchell, when its demise came, was the only loser. It seems far fetched to us that if there must be a deprivation of property, it is possible to treat Kenilworth and Mitchell as separate "persons."

The separation, too, is a fiction; yet, it is avoided where the fiction either does harm or is unreal, *e.g.*, Title 18 U.S.C., sec. 1961 *et seq.* (RICO). The fiction, both as to a corporation being a person and as to its separation from

control, has a useful purpose in the financial world, allowing flexibility of monetary liability exposure to allow a multitude of actions which could not otherwise be taken.

However, as Justice Story, in a dissenting opinion, opined long ago in *United States v. Bags of Flower*, 12 U.S. 398, 405 (1804): "It seeks to be a rule founded on common sense, as well as strict justice, that fictions of the law shall not be permitted to work any wrong. . . ," indeed, the courts realize that "(A)ll such . . . fictions originate from necessity. Its use is limited to those cases in which it is necessary that the doctrine be invoked to accomplish some beneficial result. . . ," Judge Moore in *In Re Fidelity Assurance Association*, 42 F.Supp. 973, 984 (W.D. W.Va. 1941).

Moreover, *injuria absque damno*, which *Black's Law Dictionary*, 5th Ed. p. 706 defines as "A wrong done from which no loss or damage results and which, therefore, will not sustain an action," seems appropriate also.

Kenilworth suffered no loss; Mitchell did. In turn, Mitchell was the "leader" of the entire enterprise, and being the only one injured, this Court's recent holding in *Bender v. Williamsport Area School District*, ____ U.S. ____, 106 S.Ct. 1326, 1331 (1986) that:

> " '(A)t an irreducable minimum, Art. III requires the party who invokes the court's authority to show that he has personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. . . The requirement of 'actual injury redressable by the court' . . . serves several of the implicit policies embodied in Article III. . . (I)t assures an actual factual setting in which the litigant asserts a claim of injury in fact, a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some but not all the facts of the case actually decided by the court.' "

seems appropriate, especially when combined with the use of a "fiction" to arrive at a result.

The public was not injured monetarily, no creditor was deprived of money, no claimant was deprived of money, no policyholder was deprived of money. Kenilworth, a "thing," didn't suffer because only its shareholders could suffer. Then who was injured? No one, so long as property deprivation must be proven.

The government appointed themselves guardian ad litem to the fictitious person, Kenilworth, and suddenly the court accepted this in order to give aid and comfort to the Department. The Department was the loser of its "intangible right," the court found, except that this Court knocked that into a "cocked hat." So now, let's use an alternative theory to achieve the same result.

If this prevails, then there is no doubt that overzealous prosecutors can and will create more "fictions" and vault those "fictions" into pretended injury and the limitation placed on mail fraud indictment proliferation by this Court's holding in *McNally*, which had to be followed by *Carpenter v. United States*, ____ U.S. ____, 108 S.Ct. 316 (1987) to emphasize the reality of the holding, will have gone for naught.

Not only this, but, that "fiction" will create harm, where none exists, again creating litigation unneeded.

It can be halted, but only by this Court's action.

D.

A DEFENDANT IS "INNOCENT UNTIL PROVEN GUILTY"—REJECTED; OUR FEDERAL SYSTEM OF GOVERNMENT—REJECTED; THE TRIPARTITE SUBDIVISION OF OUR FEDERAL GOVERNMENT—REJECTED, IN THIS CASE FINISHING WITH A CONVICTION UPON A RECORD TOTALLY DEVOID OF EVIDENTIARY SUPPORT ON A MAJOR ELEMENT CHARGED AND FOR A CRIME NOT CHARGED.

Mail fraud requires proof of two specific intentional acts: here, the "intent" to participate in a scheme to receive misappropriated Kenilworth premium and "intent" to use the mails. The mails were intentionally used. The indictment alleged that:

> "It was . . . a part of the scheme that . . . Patterson improperly converted premium money . . . (of) Kenilworth by distributing . . . (that) money to defendants . . . (petitioner). . . ,"

and the district court found this true; this was affirmed by the Court of Appeals.

The finding is based upon the trial court's perception that:

> "(A)ny unlawful withdraw(al) from a premium trust account is a misappropriation of insurance company funds. . . All withdrawals in excess of Robco's 30% commissions on insurance *it wrote* were misappropriations of Kenilworth premium."

There are some undisputed facts which must be brought to this Court's attention. First, Kenilworth produced no commercial insurance premium itself; second, all such premium, under the MGA, was to flow through Robco, and it was on this premium that Robco was entitled to 30%; third, Robco only received $285,000 directly, and the court was quite right it was entitled to $85,500 on those receipts; fourth, Kenilworth received $3,998,000 in premium

directly, premium received because Robco sold the policies. On this premium, by demand of Mitchell, it was only entitled to receive 10% or $398,000, which it never received; fifth, after deducting the $85,500 from the $285,000 directly and some $20,300 it sent to Kenilworth, it had $179,000 left. *It is this $179,000 which produced the controversy.*[2] What the court meant by "Robco's 30% commissions on insurance it wrote. . ." is a non-sequitar because it wrote all commercial insurance.

The controversy occurred because Kenilworth didn't remit Robco's "commissions." Mitchell and Patterson discussed this, and once again, the undisputed evidence reveals that *Mitchell told Patterson to use the funds in his hands until the end of the first accounting period when they'd straighten it out—that period never came.*

The Court must be apprised of one more undisputed fact—all witnesses testified that they expected to receive their money out of Robco's profits generated from earned commissions—anything other than that would be an act of insanity, and no one here was accused of being mentally ill. Based upon that, it required, if in fact the Court was right on the misappropriation, knowledge on the participants' part or suspicion so strong that knowledge could be implied, *United States v. Peipgrass*, 425 F.2d 194, 199 (CA. 3, 1970); *United States v. Klein*, 515 F.2d 751 (CA. 3, 1975); *Phillips v. United States*, 356 F.2d 297, 303 (CA. 9, 1966); *United States v. Pearlstein*, 576 F.2d 531, 537, 541 (CA. 3, 1978) evidence would have to be introduced in

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[2] Robco was entitled to 30% because it paid 20% to producers, leaving it 10% to pay for issuing the policy and handling adjusting. When Mitchell demanded the change, this did not relieve Robco of issuing the policy, printing it, etc., but Mitchell had Kenilworth pay the 20% producer's costs, hence, the 10% rather than the 30%.

order to establish "intent" to participate in the scheme, since that intent is a specific intent, that must be proven, *Durland v. United States*, 161 U.S. 306, 314 (1895).

The only evidence on this came out on cross-examination of petitioner as follows:

> "Q. Now, you were aware that the money being paid to Judy Gibbs (defendant's wife) would come from the Robco accounts? A. Yes. Q. Did you ever investigate the Robco accounts to ensure that the money that was being paid was not premium money? A. No. Q. Did you ever inquire as to Mr. Patterson about that? A. I assume Mr. Patterson was familiar with those . . . rules and regulations and so was Mr. Mitchell, and I am their partner. Q. Isn't it true that you never looked at one document to ensure that Judith Gibbs was not receiving premium money that was properly owed to Kenilworth. . . ? A. I never looked at any documents at Robco." (R. 705)

While the Court of Appeals ignored the original oral finding of the trial court in favor of the new findings, after remand, when it became necessary to reject the above argument, it returned to the original and quoted:

> "The defense in this case is essentially a good faith defense. In light of all the circumstancial evidence but particularly in light of defendants' sophistication in the insurance business, that defense is not persuasive."

We raised no "good faith defense," we raised the fact that there was no knowledge, and without knowledge, it was impossible to form a wrongful "intent", *compare, United States v. Martin-Trigona*, 684 F.2d 485 (CA. 7, 1982), *with, Phillips v. United States*, 356 F.2d 297, 303 (1966).

What this evinces is a deliberate erosion of the presumption of innocence in favor of a philosophy that says if the government charges, the courts must sustain, Scott Turow, *Presumed Innocent* (Farrar, Straus, Girout 1987) (a novel). Witness the "flip-flop" of the trial court to sustain the government; the Court of Appeals resting its foundation on the Memorandum Opinion of May 28, 1988, yet, where to sustain the prosecution it becomes expedient to rely on the original so the prosecution could prevail, it did so.

We go a step further. While it is true that a federal mail fraud prosecution need not be based upon a state criminal charge, *Parr v. United States*, 363 U.S. 370 (1960), nevertheless, the government is usually required to prove " 'wrongdoing in . . . (the victims) property rights by a dishonest method or schemes' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching,' " *McNally v. United States*, 483 U.S. 359, 107 S.Ct. 2275, 2881 (1987), here we deal with a violation of the Illinois Insurance Code.

Hence, how that Code, on the same subject, has been interpreted, is the law that should be followed, *Durlan v. United States*, 356, 161 U.S. 306 (1985); *Parr v. United States*, 363 U.S. 370 (1960). Here there is a rejection of that principle, for the Illinois Supreme Court has held, under almost identical conditions, that Patterson's action was a mere "technical violation of the statute," *Dorfman v. Gerber*, 29 Ill.2d 191 (1963) not raised to criminal perspective, thus, reversing the holding of its own appellate court now adopted by the Federal courts.

Yet, it is symptomatic of the whole problem. Congress has rejected control of the insurance industry in favor of

state control. In our Federal system of government, this should come as no surprise. While there is no Federal common law crimes, *United States v. Goodwin & Hudson*, 7 Crunch. 32, 3 L.Ed. 259 (1812); Warren, *Some New Light On The Federal Judiciary Act Of 1789*, 37 Harv. L. Rev. 49, 73 (1923), one has just been created by the executive—Department of Justice. Since the courts no longer in their zealous guard for the Constitution stand at the individual's side as his champion against constitutional usurpation, but, now, rather, place themselves besides the executive to protect that branch of Government to the exclusion of all other, the very foundation of our tripartite Government disappears, and the Department of Justice become "big brother," with only this Court standing between all.

The upshot to this petitioner is that he has been convicted of a crime with a Record that has no evidence to establish an essential element of that crime, "intent" to participate, which should have voided his conviction, *Thompson v. Louisville*, 362 U.S. 199 (1960). In addition, petitioner is found guilty of a "scheme to deprive *Kenilworth and its policyholders of money*," (App. p. A-18; emphasis added), a charge never made, hence itself a constitutional deprivation, *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) but that too is rejected because of the perceived overweening need to sustain whatever the Department of Justice has wrought.

Only this Court can prevent the continuation of such a course.

CONCLUSION

For the reasons advanced, Petitioner prays that this Court issue its Writ of Certiorari to review the judgment entered in this cause by the United States Court of Appeals for the Seventh Circuit, and that upon a complete review, his conviction be reversed.

Respectfully submitted,

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88-1911

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH R. COSENTINO, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH R. COSENTINO, SR.,

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UNITED STATES OF AMERICA,

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APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 86-3090 & 86-3098

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH R. COSENTINO, SR. and ROBERT H. PATTERSON,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 CR 350—**Marvin E. Aspen,** *Judge.*

ARGUED OCTOBER 28, 1988—DECIDED FEBRUARY 8, 1989

Before BAUER, *Chief Judge,* and CUMMINGS and CUDAHY, *Circuit Judges.*

CUDAHY, *Circuit Judge.* We visit once more the issue of "intangible rights" raised by mail fraud cases in the wake of the Supreme Court's decision in *McNally v. United States,* 107 S. Ct. 2875 (1987). After a number of years during which the government successfully prosecuted defendants under the mail fraud statute for depriving people of "intangible rights," the Supreme Court ruled in *McNally* that a deprivation of intangible rights alone could not support a conviction for mail fraud under 18 U.S.C. section 1341. *Id.* at 2881 ("We read § 1341 as limited in scope to the protection of property rights."). As a result, defendants like those in the case before us who were con-

victed under the intangible rights theory now seek to have their convictions vacated.

The defendants in this case, Cosentino and Patterson, were originally convicted in a bench trial before Judge Aspen. While their case was on appeal, this court ordered it remanded for other reasons and then extended the order of remand to include reconsideration in light of *McNally*. On remand, Judge Aspen made supplemental findings of fact, and ruled that the scheme in this case involved a property right sufficient to sustain the convictions under *McNally*. Defendants appeal. We affirm.

I.

A.

In reviewing the facts, we take all evidence and inferences in the light most favorable to the government's case. *United States v. Goudy*, 792 F.2d 664, 674 (7th Cir. 1986). The case centers on the Kenilworth Insurance Company ("Kenilworth"), an insurance company that originally dealt in substandard automobile insurance. This specialty did not generate great profits for the company, and by 1981 the company was so thinly capitalized that it was required by the Illinois Department of Insurance (the "Department") to submit special quarterly reports on its financial condition.

The president and majority owner of the company, Chester Mitchell, made a number of efforts to save his company, expanding beyond substandard auto insurance over the protests of Kenilworth's minority owner, Milt Law. The first of these efforts took Kenilworth into the business of bond guarantees in 1981 with the help of defendant Cosentino, who met Mitchell after hearing through a mutual friend that Kenilworth might be interested in expanding into new lines of insurance. Through Cosentino, Mitchell also met defendant Patterson, who with his wife owned an insurance brokerage firm named Robco Worldwide Facilities, Inc. ("Robco"). In 1981 Mitchell entered into an agreement with Patterson that Robco

would now place property and casualty insurance business with Kenilworth.

Patterson subsequently introduced Mitchell and Cosentino to Alan Assael and Jack Goepfert, who also had backgrounds in the insurance business. Assael, whom Patterson had originally known under another name, was at that time under indictment in the Southern District of New York for conspiracy and mail fraud—charges to which he subsequently pleaded guilty. By 1981 Goepfert had been convicted on felony charges in the U.S. District Court in the Eastern District of Pennsylvania, and subsequently pleaded guilty to charges filed against him in the Southern District of New York.[1] In 1981 Assael was employed by Goepfert as an underwriter. In a meeting attended by Patterson, Goepfert and Assael at the Newark Airport in the summer of 1981, Patterson mentioned Kenilworth's interest in obtaining new business, and Goepfert represented to Patterson that he could produce $20,000,000 in business for Kenilworth.

As a result of this exchange at the Newark meeting, there ensued a series of meetings in Chicago that included Patterson, Cosentino, Assael, Goepfert and Mitchell. During the course of these meetings, Assael and Goepfert indicated that the Department of Insurance was unlikely to countenance their involvement in any planned business venture because of their past legal difficulties and discussed ways in which their involvement could be concealed from the Department. The meetings culminated in a handwritten agreement dated November 28, 1981, detailing a new business arrangement involving Cosentino, Patterson, Goepfert and Mitchell. The agreement provided that all

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[1] Assael and Goepfert both served sentences for these earlier crimes. Both men were apparently cooperating with the government in this case. Assael was granted immunity as to his involvement in the activities at issue here. Goepfert's sentence on his earlier convictions was reduced in return for his cooperation; he pleaded guilty in this case.

of the parties were now to have equal ownership in and rights to profit from Kenilworth and Robco.[2] Robco would serve as a managing general agency through which all of Kenilworth's business would be handled. The parties were also to receive annual salaries of $200,000, with some additional payments to Mitchell in view of the fact that he "had put a great many years of his life into [Kenilworth]." Record at 54. All four men provided that their ownership interests were to be listed in the names of their wives or children, to obscure their involvement in the arrangement. Although the Illinois Insurance Code requires that the Illinois Department of Insurance be notified of changes in ownership and control of insurance companies, Ill. Rev. Stat. ch. 73, ¶¶ 743.1, 743.4, 753, 753.1 (1981), none of the parties to this agreement filed it with the Department.

In January of 1982 Goepfert drew up a managing general agency agreement governing the relationship between Robco and Kenilworth, a contract which once again was not filed with the Department. Using Robco as a managing general agency permitted the parties more latitude, because the Illinois Department of Insurance did not monitor the funds flowing to agencies like Robco as closely as it did funds going to insurance companies like Kenilworth. (In any case, Kenilworth, as noted above, was at the time under particularly close scrutiny because of its

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[2] Kenilworth's minority owner, Law, had been bought out in September of 1981 by Cosentino, who had his son sign the purchase agreement because he himself was at that time under investigation. In January of 1982 this first agreement was replaced by a contract that substituted Mitchell for Cosentino as the purchaser, evidently because Mitchell was concerned about the investigation involving Cosentino at the time. However, although Mitchell's name was substituted, the down payment came from Cosentino, and the remaining funds were provided by a third party, Barry Toomey. The contract between Law and Mitchell was duly filed with the Department as required by the Illinois Insurance Code for any change of ownership or control of an insurance company. Ill. Rev. Stat. ch. 73, ¶¶ 743.1, 743.4, 753, 753.1 (1981).

marginal financial condition.) Robco held Kenilworth's funds in a "premium trust account," from which it could withdraw money for commissions. Under the January agreement, Robco was entitled to a 30% commission, an amount which an official from the Department testifying at the trial characterized as "excessive." Record at 263. Robco actually withdrew approximately 90% of the funds in the trust account, thereby exceeding the already generous commission fee to which it was entitled. *United States v. Patterson*, No. 86 CR 350-2, mem. op. at 6 (N.D. Ill. May 25, 1988). Patterson subsequently disbursed the money he obtained from the premium trust account to Mitchell's son, Cosentino's wife, Goepfert's wife and Assael's wife. He also used the money to pay office expenses. He himself did not withdraw money for his salary, but he told the bookkeeper to credit him $2,000 per week in salary. He later admitted that he would probably have eventually attempted to collect that money. The small percentage of the trust account funds that was remitted to Kenilworth evidently went to pay that company's expenses.

The managing general agency agreement with Robco not only permitted increased flexibility in withdrawing funds that properly belonged to Kenilworth, but also allowed Kenilworth to delay reporting its new business to the Department. Kenilworth thereby succeeded in writing much more insurance than was justified by its then-existing surplus, without alerting the Department to its increasingly insolvent condition. Eventually, despite efforts to reinsure these new policies through a British insurance agency, Kenilworth could no longer avoid the inevitable showing of insufficient surplus, and the Department closed it down in April of 1982.

B.

Cosentino and Patterson were indicted and convicted on eight counts of mail fraud. The indictment charged them and their co-defendants with scheming to defraud Kenil-

worth, its policyholders and claimants, the Illinois Insurance Guarantee Fund and its member companies, the Illinois Department of Insurance and the State of Illinois of their right to have Kenilworth's business conducted honestly. The indictment further charged them with participating in a scheme "[t]o obtain money by means of false and fraudulent pretenses and representations," and went on to describe the way in which the defendants planned to "utilize and operate Kenilworth for the purpose of obtaining money by improperly converting to their use Kenilworth insurance and bond premiums." Appendix of Appellant Cosentino at 13. The rest of the indictment contained further references to specific financial transactions in which Kenilworth's funds were used improperly. The indictment also noted the steps taken by the defendants to conceal their actions from the Illinois Department of Insurance.

Both men were convicted following a bench trial before Judge Aspen. During closing argument, Patterson's counsel attempted to address the part of the indictment that charged Patterson with scheming to obtain money by means of false and fraudulent pretenses and representations:

> DEFENSE COUNSEL: Then we go to the last one, which was to obtain money by means of false and fraudulent pretenses and representations. And this record is silent as to any misrepresentations or fraudulent pretenses or representations.
>
> And as far as the obtaining of money is concerned here, where did that money come from? It came from policyholders and—
>
> THE COURT: I don't think the government has even argued that particular fraud, so—
>
> DEFENSE COUNSEL: They are conceding that it wasn't there.
>
> THE COURT: So I think for the purposes of this argument, you do not have to go through that.
>
> DEFENSE COUNSEL: All right.

Record at 838. In finding the defendants guilty as to the eight mail fraud counts, Judge Aspen commented:

> The defense in this case is essentially a good faith defense. In light of all the circumstantial evidence but particularly in light of the defendants' sophistication in the insurance business, that defense is not persuasive.

Appendix of Appellant Cosentino at 25.

At the subsequent sentencing hearing, Judge Aspen sentenced Cosentino to the custody of the Attorney General for nine months on Count I, and then to five years' probation on the remaining counts. The court additionally required that Cosentino serve three thousand hours in community service, and that he be prohibited from working in the insurance industry during his probation. Judge Aspen sentenced Patterson to the custody of the Attorney General for eighteen months on Count I[3] and five years' probation on the remaining counts, to be served consecutively. The court also fined Patterson $1,000 on each of the eight counts, and required that Patterson continue to receive psychological therapy, perform one thousand hours of community service, divest any remaining interests in the insurance industry and refrain from working in the insurance industry.

This court remanded the defendants' original appeal and ordered consideration of the defendants' motions to vacate their convictions and sentences in light of *McNally*. Judge Aspen denied the defendants' motions and issued supplemental findings of fact:

> This Court finds that one of the goals of defendants' scheme was to misappropriate Kenilworth Insurance Company premiums. Although this Court also concluded that defendants had deprived the Illinois Department of Insurance of its intangible right to be

[3] The court later reduced this period to fourteen months.

> fully informed and that the policyholders in turn were deprived of that regulation, it also concluded that Kenilworth Insurance Company was a victim of this scheme when its premiums, which were held in trust by Robco, were unlawfully withdrawn and disbursed in furtherance of this scheme.

United States v. Patterson, No. 86 CR 350-2, mem. op. at 12 (N.D. Ill. May 25, 1988).

In this appeal both defendants raise *McNally* challenges to their convictions. They also challenge the sufficiency of the evidence in a number of respects. In addition, Cosentino objects to Judge Aspen's supplemental fact-finding on remand as "double jeopardy." Patterson urges that the court's decision to sentence him more harshly than the other defendants constituted an abuse of discretion.

II.

A.

We consider first the defendants' *McNally* challenge to their convictions. *McNally* held that the mail fraud statute protects property rights, but not intangible rights such as the "right of the citizenry to good government." 107 S. Ct. at 2879. In *McNally* state officials arranged to have the state's insurance business funneled through designated agencies, which in turn redistributed excess commission money to the officials and their business partner. The defendants in *McNally* were convicted of defrauding the citizens and state government of their right to have state business conducted honestly, and for scheming to obtain money and things of value through false pretenses and concealment. *Id.* at 2878. The Court, noting that "the jury was not required to find that the Commonwealth itself was defrauded of any money or property," held that the indictment and jury instructions "permitted a conviction for conduct not within the reach of § 1341." *Id.* at 2882.

In *Carpenter v. United States*, 108 S. Ct. 316 (1987), the Court gave further guidance as to what kind of prop-

erty would meet the test set out in *McNally*. The property at issue in *Carpenter* was confidential securities information, which although admittedly "intangible" in character nonetheless met the *McNally* test. *Id.* at 320. The Court accordingly upheld the *Carpenter* defendant's conviction for depriving the Wall Street Journal of its right to exclusive use of the confidential information in question. Thus a deprivation of "intangible" *property* violates the mail fraud statute, but a deprivation of intangible rights (such as the right to good government, the right to honest administration of the justice system, etc.) does not.

This court has applied *McNally* and *Carpenter* to uphold a number of convictions which were originally obtained under the intangible rights theory. In *United States v. Wellman*, we upheld the conviction of a defendant who conveyed fraudulent information regarding the chemical shipping tanks he sold. 830 F.2d 1453 (7th Cir. 1987). The defendant in *Wellman* was charged both with defrauding the buyer of "its right to have safe and authorized equipment for the storage and shipment of hazardous chemicals," and with obtaining money "by means of false and fraudulent pretenses." *Id.* at 1463. The jury instructions permitted the jury to convict if it found the defendant guilty of either of these charges. Thus it was possible that the conviction rested upon a deprivation of the buyer's intangible right ("to have safe and authorized equipment") alone. However, the *Wellman* court looked "to the substantive allegations of the indictment and the jury instructions to determine whether the conduct alleged and necessarily found to have occurred by the jury constituted an offense." *Id.* at 1462. Even though the indictment and jury instructions used intangible rights language, the court observed that "[t]he legal characterization the indictment places on the scheme should not obscure the fact that the specific conduct alleged in the indictment is clearly proscribed by the mail fraud statute." *Id.* The court concluded that it did not matter on which part of the indictment the jury had based its conviction, because both

alleged identical conduct—the fraudulent sale of tanks using false representations. This conduct was clearly the kind of "garden variety" fraud prohibited by the mail fraud statute, involving a planned deprivation of property. *Id.* at 1463.

The *Wellman* approach has been utilized in several subsequent Seventh Circuit cases. In *United States v. Bonansinga*, for example, the court looked "beyond the face of an indictment" that used intangible rights language and upheld the conviction of a public servant charged with procuring paint and auto supplies with public funds for his personal use. 855 F.2d 476, 479-80 (7th Cir. 1988). The underlying scheme charged in *United States v. Bailey*, 859 F.2d 1265 (7th Cir. 1988), similarly involved conduct clearly proscribed by the mail fraud statute—defrauding a bank of its assets. In both *Bailey* and *Bonansinga*, the indictments, jury instructions and evidence at trial all indicated that the underlying scheme involved conduct prohibited by the mail fraud statute—that is, a deprivation of money or property. Thus in order to convict the defendants of the schemes alleged, the jury *necessarily* had to convict them of scheming to deprive the alleged victims of property. *See also Moore v. United States*, No. 88-1347 (7th Cir. Jan. 9, 1989) (scheme to deprive sanitary district of bid money necessarily involved both deprivation of money and deprivation of public's right to honest and loyal service); *United States v. Folak*, No. 88-1038 (7th Cir. Dec. 19, 1988) (scheme to deprive county of funds from seizure warrants necessarily involved both deprivation of money and public's right to honest and faithful service).[4]

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[4] In cases in which two distinguishable schemes were alleged, one involving property and the other involving intangible rights, this court has taken different approaches. In *United States v. Eckhardt*, this court held that the portions of the indictment that charged the defendant with intangible rights violations were "easily separable" from the portions alleging a scheme to deprive victims of property, and thus were "mere surplusage" that failed to "taint

(Footnote continued on following page)

Similarly, in the case before us, the scheme to deprive Kenilworth and its policyholders and claimants of their "right to the conscientious, loyal, honest, faithful and impartial services, decisions, actions, and performance of duties" by the defendants was also the scheme that deprived Kenilworth of sound financial management. The two schemes are one and the same, and both allege conduct prohibited by the mail fraud statute—conduct that bled Kenilworth of needed money and permitted it to write more insurance than it should have. Further, in misleading the Department of Insurance, the scheme permitted the agency to remain in business past the point it would have had the Department been aware of the defendants' activities—and that additional time allowed the defendants more time to take Kenilworth's money from the Robco account.

This case closely resembles *United States v. Bailey*, 859 F.2d 1265 (7th Cir. 1988), which involved a scheme to deceive the Federal Home Loan Bank Board ("FHLBB") and the Federal Savings and Loan Insurance Corporation ("FSLIC") about the declining assets of a bank. Like Kenilworth, the bank in *Bailey* was already in trouble and subject to additional scrutiny by a regulatory agency. The scheme in *Bailey* gave the defendants additional time to bilk the bank of assets it badly needed. In this case, Kenilworth's already precarious financial position was made worse because the defendants were able to deceive the Department of Insurance about Kenilworth's situation and

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[4] *continued*

the remainder of the indictment." 843 F.2d 989, 997 (7th Cir. 1988). In *United States v. Cooke*, this court vacated the defendant's convictions as to counts of the indictment that charged intangible rights violations only, and upheld his convictions on counts that charged deprivations of property. 833 F.2d 109, 111 (7th Cir. 1987). In the case before us this problem does not arise, because the scheme alleging deprivation of intangible rights is identical to that alleging deprivation of property; where the two are identical, the analysis from *Wellman* is more appropriate than that from *Eckhardt* or *Cooke*.

keep the agency open longer, as more and more assets disappeared through Robco and as the insurance written through Kenilworth exceeded its reserves to a greater and greater extent. Like the business deals in *Bailey*, the business arrangements here could conceivably have generated a profit, but they could as easily—and actually did—result in financial catastrophe. In essence, the plan here entailed risks not permitted by the laws and regulations designed to protect insurance agencies—and the policyholders and claimants who depend on those agencies. It is not necessary that a plan actually result in financial loss as long as it is aimed at the fraudulent deprivation of some of the victim's money or property. *United States v. Dial*, 757 F.2d 163 (7th Cir. 1985); *United States v. Reicin*, 497 F.2d 563 (7th Cir. 1974). Fraudulent deprivation of Kenilworth's money was no less a fraud because it was part of a scheme that might have generated a profit.

At issue here are the financial assets of the alleged victims, and not nebulous rights to have business conducted honestly.[5] Accordingly, we affirm the denial of the defendants' motion to vacate their convictions and sentences in light of *McNally*.

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[5] Thus this case is easily distinguishable from cases such as *United States v. Holzer*, 840 F.2d 1343 (7th Cir. 1988), in which the only property or money at issue was bribe money received by a state judge. This money could hardly have been characterized as the property of the state or its citizens. Further, the person from whom the bribe money was taken in *Holzer* was the perpetrator of the scheme, not its victim. The victim of bribery schemes such as that in *Holzer* is arguably the public, which is robbed of the proper administration of its system of justice, but not of any property or money. *See also Ward v. United States*, 845 F.2d 1459 (7th Cir. 1988) (affirming district court decision vacating conviction of attorney involved in bribery scheme). Convictions have also been vacated where the indictments failed to allege any deprivation of money or property, *see United States v. Gimbel*, 830 F.2d 621, 627 (7th Cir. 1987); *Magnuson v. United States*, 861 F.2d 166 (7th Cir. 1988), but that is clearly not the case here. *See supra* I. B.

B.

The defendants challenge the sufficiency of the evidence in this case on a number of points. Of course, defendants bear a heavy burden, for the verdict must be sustained if " '*any* rational trier of fact could have found guilt beyond a reasonable doubt.' " *United States v. Reynolds*, 801 F.2d 952, 954 (7th Cir. 1986) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original)). In order to convict the defendants under 18 U.S.C. section 1341, the government must adduce sufficient evidence with respect to three elements: (1) the existence of a scheme to defraud in which the defendants were participants; (2) intent to defraud on the part of the defendants; and (3) use of the mails in furtherance of the scheme. *See, e.g., Bailey*, 859 F.2d at 1273; *Wellman*, 830 F.2d at 1461.

Both defendants challenge the sufficiency of the evidence as to the existence of a scheme and as to intent. Defendants argue that the plan in this case was designed to save Kenilworth rather than to defraud it, that each of the arrangements taken individually were perfectly legal, that the defendants were not required to report their arrangements to the Department of Insurance and that there is no evidence of knowledge or intent to defraud. In essence, as Judge Aspen noted in his original ruling, these arguments assert a good faith defense, attempting to justify the transactions at issue as bona fide (if perhaps poorly conceived) business transactions. Judge Aspen had before him a great deal of testimony about deliberate attempts to cover up the transactions in this case—not only in order to conceal the involvement of individuals already under indictment for their participation in other transactions but also to keep the Department from shutting down a business that was operating outside of the limits set by state regulations. Judge Aspen concluded that "[i]n light of all the circumstantial evidence but particularly in light of the defendants' sophistication in the insurance business, that defense is not persuasive. It is not conceivable that they did not fully know of the machinations, the fraud that was being perpetrated." Record at 864.

This conclusion is well-supported by the evidence in the record. That the transactions should have been reported to the Department of Insurance is self-evident from an examination of the pertinent Illinois statutes.

Patterson argues that because he did not actually convert any of the Robco funds to his own personal use, his conviction should be reversed. However, the evidence showed that Patterson asked Robco's bookkeeper to credit his account $2,000 per week, an amount that he himself conceded he would eventually have collected. Even had this not been the case, it is not necessary that a participant in a fraudulent scheme actually profit from that scheme before he or she can be convicted for participating.

In addition, Patterson challenges the sufficiency of the mailings. The eight mailings in the indictment were insurance premiums on Kenilworth policies submitted to Robco through Patterson. In order to satisfy the mail fraud statute, these mailings must have been integrally involved in the scheme to defraud, so that there was "some link between the mailing and the success of the scheme." *United States v. Kwiat*, 817 F.2d 440, 443 (7th Cir. 1987); *see also United States v. Lane*, 474 U.S. 438 (1986); *United States v. Bonansinga*, 773 F.2d 166 (7th Cir. 1985). The mailing itself may be "innocent," as long as it is an integral part of the scheme. *United States v. Green*, 786 F.2d 247, 249 (7th Cir. 1986). In this case the mailings were an integral part of the arrangement between Kenilworth and Robco. Indeed, the mailings contributed to the success of the scheme while it was in place, because they were among the payments first sent to Kenilworth and then forwarded to Robco in pursuance of the scheme to divert Kenilworth's funds.

The evidence as to the scheme, the defendants' intent and the mailings was fully adequate to support the court's ruling. The defendants have failed to meet their quite heavy burden in this regard.

C.

Cosentino objects to Judge Aspen's supplemental fact-finding on remand on the grounds that it constituted double jeopardy in violation of the fifth amendment. As noted in *Holzer*, it is a "nice question" whether a defendant whose conviction is vacated post-*McNally* because of insufficient evidence of property deprivation may then be retried, with the government introducing new evidence to prove property deprivation, "without violating the double-jeopardy clause." *Holzer*, 840 F.2d at 1349.

In this case the defendant was not retried, but the court did make supplemental findings of fact in considering the defendant's case on remand. Although these findings did furnish new support for a finding of property deprivation to uphold the original conviction, they were based on evidence originally submitted at trial rather than newly-introduced evidence and they purported to clarify the court's original finding rather than create a new one.

The defendant found the court's action particularly objectionable in light of Judge Aspen's original refusal during closing argument to entertain arguments about the part of the indictment charging the defendants with scheming to "obtain money by means of false and fraudulent pretenses and representations." *See supra* Section I. B. This action would indeed be a serious problem had Judge Aspen refused to allow *evidence* on this point. And it might be problematic if we were conducting our review specifically based on the "obtaining money by false pretenses" part of the indictment. Although loss of money is alleged most explicitly in that portion of the indictment, loss of money is necessarily also alleged in the portion of the indictment charging intangible rights violations. As we commented above, the scheme described in intangible rights language is identical with the scheme to "utilize and operate Kenilworth for the purpose of obtaining money by improperly converting to their use Kenilworth insurance and bond premiums." Appendix of Appellant Cosentino at 13. To convict the defendants of defrauding Kenil-

worth of its right to their honest services, the court necessarily had to convict them of a scheme that also deprived Kenilworth of financial assets.

This is apparent in arguments that were successfully presented to the district court. For example, in its final argument at trial, the government commented:[6]

> So that was the essence of the scheme to defraud, . . . to conceal the way in which they were going to try to revive Kenilworth, and to conceal the fact that they were bringing in all this premium money. In turn, that is a fraud on the policyholder . . . . [W]e don't know what happened to [the] money when it got to Kenilworth except a little bit through Mr. Patterson's testimony, who said it was used to pay the expenses of Kenilworth.
>
> Logically, that is not what the money should have been used for. Some should have been put in reserve funds, some should have been put in the surplus . . . .

Id. at 851-52. The government had also discussed deprivation of money in addressing a challenge to the sufficiency of the mailings involved in the scheme: "[T]here is no question that this whole scheme to defraud revolved around getting money. And the way they got money was through the checks being mailed into Robco." *Id.* at 857.

Thus the convictions in this case clearly survive under the *Wellman* analysis currently employed in this circuit with respect to the portion of the indictment charging an "intangible rights" scheme alone. The reason for this is that the scheme as described necessarily involved a deprivation of property. It is unclear what Judge Aspen

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[6] These comments during the government's final argument echo its discussion of the financial aspects of the scheme in question in this case during its opening and closing arguments, *see* Record at 8-11, 809, 816 (purpose of scheme was "to siphon off the money from the Kenilworth Insurance Company").

meant by his original comment about the "obtaining money by false pretenses" part of the indictment, but in order to find the defendants guilty of intangible rights violations he necessarily also found that they had engaged in a scheme to deprive Kenilworth and its policyholders of money. Thus the statements contained in his later fact-finding are consistent as a matter of substance—if not of form—with his original decision in the case. We reach this conclusion after careful scrutiny, for in general a subsequent finding reinterpreting a prior ruling in light of changes in the law is not necessarily to be favored and should be subjected to sharp scrutiny. It might be that in some future case a subsequent reinterpretation could so clearly conflict with original findings, or so patently rely on evidence not received at the original trial, that double jeopardy is implicated. But such was not the case before us.

D.

Patterson urges that the district court's decision to sentence him more harshly than his co-defendants constituted an abuse of discretion. Our reading of the sentencing hearing transcript convinces us that this was not the case. Judge Aspen gave a reasoned explanation for each of his sentencing decisions in this case, and he expressed more doubt about Patterson than about any of the other defendants:

> As to Mr. Patterson, you clearly in my view participated in this scheme for no motive other than to enrich yourself unjustly. In my view, it is a crime that was motivated by greed. Although you throw yourself on the mercy of the Court, I am not convinced to this day that you have acknowledged perhaps, not even in your own mind your responsibility for the offense which occurred.

Transcript at 50. By contrast, Judge Aspen felt that Mitchell had "fully and sincerely perhaps belatedly accepted full responsibility" for his criminal acts, and that

those acts were not motivated by personal greed but by Mitchell's admittedly misguided zeal to save a foundering company. *Id.* at 48-49. Cosentino was, in the court's view, "not as culpable in terms of the main offense as some of the others." *Id.* at 52. This is certainly an adequate explanation of the disparity in sentences, which was in any event not of major dimensions. *See United States v. Tucker*, 404 U.S. 446 (1972); *United States v. Ford*, 840 F.2d 460 (7th Cir. 1988); *United States v. Ely*, 719 F.2d 902 (7th Cir. 1983).

III.

The indictment in this case charged the defendants with a scheme to deprive Kenilworth and its policyholders of money, thus stating an offense under 18 U.S.C. section 1341. The evidence presented at trial was fully adequate to support the defendants' convictions, and the defendants were not subjected to double jeopardy by Judge Aspen's subsequent findings. Further, there was no abuse of discretion in Patterson's sentencing. The decision of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 8, 1989.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*

Nos. 86-3090 and 86-3098

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JOSEPH COSENTINO, SR. and
ROBERT H. PATTERSON,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 CR 350—Judge Marvin E. Aspen.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 22, 1989.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*

Nos. 86-3090 and 86-3098

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH R. COSENTINO, SR. and
ROBERT H. PATTERSON,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 CR 350—Marvin E. Aspen, *Judge.*

ORDER

On consideration of the Petition for Rehearing with Suggestion for Rehearing En Banc filed by counsel for the

defendant-appellant in the above-named cause, no judge in active service has requested a vote and all of the judges on the original panel have voted to deny the rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 CR 350-2 Date: MAY 25 1988

Name of Assigned Judge: MARVIN E. ASPEN

Case Title: United States of America
-v- Robert H. Patterson

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Pursuant to Memorandum Opinion and Order entered this day, defendant Patterson's motion to vacate his judgment of conviction and sentence is denied.

* * * * *

(12) ☒ (For further detail see
☐ order on the reverse of
☒ order attached to the original minute order form.)

* * * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

No. 86 CR 350-2 v.

ROBERT H. PATTERSON,

Defendant.

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

On October 1, 1986 after a bench trial, this Court found defendant Robert Patterson guilty on eight counts of mail fraud for his participation in a scheme to misappropriate premiums from the Kenilworth Insurance Company ("Kenilworth"). Patterson was sentenced to the custody of the Attorney General for a period of eighteen months, fined $7,000 and placed on probation with certain special conditions. On December 11, 1986 this Court reduced Patterson's incarceration period to fourteen months. Presently before the Court is an Order on remand from the Seventh Circuit to consider Patterson's motion to vacate judgment of conviction and sentence in light of *United States v. McNally*, 107 S.Ct. 2875 (1987) and *United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987). Because we conclude that there is no reason to vacate Patterson's conviction and sentence in light of *McNally* and *Gimbel*, we deny Patterson's motion.

Facts

The indictment sets out a scheme utilized to manipulate the safeguards of Illinois insurance law in order to loot

a premium trust account of an insurance company. Illinois statutes and regulations prohibit the misapplication or conversion of insurance premiums held by an insurance agent or broker in a fiduciary capacity. Illinois law also prohibits the sale or exchange of stock of an insurance company without the approval of the Director of the Department of Insurance ("Department") and precludes the execution of an exclusive agency agreement by an insurance company without the approval of the Director of the Department. These regulations assist the Department in protecting the individual insured from the activities of an unscrupulous insurance company which could just abscond with the premiums.

Kenilworth was a duly authorized Illinois Insurance Company. It had, historically, been a substandard automobile insurance company. By 1981, however, it was in a precarious financial situation. Because of this, the Department, in closely monitoring the company, required Kenilworth to submit quarterly financial information.

In an effort to remedy Kenilworth's financial plight, Kenilworth's president, Chester Mitchell, sought to expand Kenilworth's charter to allow the company to also underwrite property and casualty insurance. In the course of these efforts to expand Kenilworth, defendants Patterson and Joseph Cosentino, Sr., became involved with Kenilworth. Patterson, in turn got Alan Assael and Jack Goepfert involved in Kenilworth. Goepfert indicated that he could produce $20 million in business for Kenilworth.

On November 28, 1981, Goepfert, Cosentino, Mitchell and Patterson met in Chicago to discuss the split of profits from the business. This meeting resulted in a handwritten agreement drafted by Mitchell and signed by the parties wherein they were all to have equal ownership in and right to profits from certain entities including Kenilworth, annual salaries of $200,000, and certain additional remuneration to go to Mitchell.

The plan, proposed by Goepfert, to revitalize Kenilworth, involved appointing agents and writing a signifi-

cant amount of liability and property insurance which would be reinsured through another source and directing all the business through a managing general agency to be set up for Kenilworth. After the November 28, 1981 meeting, a managing general agency agreement for Kenilworth was drafted. Normally, a managing general agency for an insurance company is an agency with expertise in a particular insurance field and which handles that particular type of insurance for the company. Here, however, the entity used as the managing general agency for Kenilworth was Robco, a dormant agency in Patterson's name, and it was decided that *all* of the Kenilworth insurance would be written through Robco. The reason for this arrangement was to siphon off money from Kenilworth without the Department being able to stop it. With a managing general agency agreement, a commission could be deducted from all business written on behalf of the insurance company. If the money went directly to Kenilworth it would have been scrutinized more carefully by the Department than money taken out of the managing general agency. Or, as stated by Assael at trial, the importance of Robco as the managing general agency was to "shortstop" premium money from going to Kenilworth. The money taken in through Robco was to be split equally between Goepfert, Cosentino, Patterson and Mitchell.

There was another purpose of the managing general agency agreement and that was to allow Kenilworth to write far more insurance than it had surplus on the books to justify. The agreement allowed Robco to withhold from Kenilworth all premium money and claims so that Kenilworth in turn could avoid reporting this information to the Department. If Kenilworth had reported all this new business without sufficient reserves, the Department would have come in and shut Kenilworth down as insolvent, which it eventually did when this scheme came to light.

Therefore, by manipulating Illinois insurance law requirements, the schemers were able to misappropriate Kenilworth insurance premiums from Robco's premium

trust account. A premium trust account is used as a depository for premiums collected by an agent or broker on behalf of an insurance company. The purpose of the account is to ensure that an agent or broker accounts for the premiums that he receives and remits the premiums to the insurance company. The agent or broker acts as a trustee with respect to the account. Money may be withdrawn from a premium trust account for only two reasons: To remit the premium money to the insurance company or to withdraw the agent or broker's lawful commission derived from generating the premiums. If a managing general agent feels that he is entitled to commissions on business other than that in the premium trust account, the agent must seek other means to obtain that money; he may not withdraw it from the premium trust fund account.

Under the Kenilworth/Robco agency agreement, premium money was to be deposited in a Robco premium trust account and then remitted to Kenilworth less commissions. Because Robco's commission rate was 30%, all other premiums should have been turned over to Kenilworth as they were Kenilworth's property. It was Patterson's defense, which this court rejected, that Robco was entitled to all of the premiums it brought in as compensation for commissions on business sold by other agents.[1]

So, in general, the scheme allowed the parties to funnel insurance business to Kenilworth through Robco and split 100% of the premiums. This, of course, was in violation of Illinois law which prohibited withdrawals from Robco's premium trust account other than for commissions (here 30%) or to pay Kenilworth. Patterson's justification for taking all the premiums immediately was that the group planned to secure 100% reinsurance of all Kenilworth policies so they had anticipated that the premiums

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[1] This was also contrary to Illinois insurance law which deemed all premiums in the trust account less lawful withdrawals the property of Kenilworth. *See*, 50 Ill.Ad.Code § 3113.40(i).

would eventually be surplus. This, of course, ignored the law. If defendants tried to do this with Kenilworth directly, they would not have gotten far because the Department would have stopped it immediately. Thus, Robco was needed so they could execute their plan without the Department's scrutiny.

The Department normally would have brought this scheme to an end before it ever got going if its regulations had been followed. But keeping the Department in the dark was a key component of the scheme. Not only would the Department have scrutinized the withdrawals from the premium trust account, but had the handwritten ownership agreement been filed, as required under Illinois insurance law, the Department would have disapproved the agreement. And, if the Department knew that Goepfert and Assael were involved with Kenilworth, the Department would shut down the operation immediately. This was because both had criminal fraud charges pending against them in New York. Thus, the necessity of not filing the handwritten agreement as required by law for Department of Insurance approval.

After the Department shut Kenilworth down in April, 1982, the Robco premium trust account was audited. The audit showed a significant increase in premium account funds beginning in December, 1981 and continuing until April, 1982 when Kenilworth was closed down. The audit determined that Robco received approximately $285,000 in premium money on Kenilworth policies, and, only two payments totaling $20,308 were actually remitted to Kenilworth. The auditor traced the flow of the premium money and then found that the premiums received by Robco were deposited in Robco's premium trust account and then approximately 90% were withdrawn and deposited into general operating accounts controlled by Patterson. Patterson then disbursed this money to various individuals and for office expenses. He did not send any of it to Kenilworth, although by law, everything above the 30% commission was Kenilworth's. Although Patterson claimed that he never drew his salary of $2,000 per week, he also

told his bookkeeper to keep track of this weekly amount and he would consider that amount to be a credit against his account. Patterson admitted that he suspected that he eventually would have asked for this money from Kenilworth.

Motion to Vacate

In *McNally v. United States*, the Supreme Court held that the mail fraud statute is "limited in scope to the protection of property rights," and that it does not proscribe schemes to defraud individuals or entities of intangible rights. 107 S.Ct. 2875, 2881 (1987).[2] Before the Supreme Court decided *McNally*, the mail fraud statute was routinely used to prohibit schemes that deprived people of intangible rights. "In the public sector, judges, state Governors, chairmen of state political parties, state cabinet officers, city aldermen, congressmen and many other state and federal officials have been convicted of defrauding citizens of their right to the honest services of their governmental officials." *McNally*, 107 S.Ct. at 2883 and n.1 (Stevens, J., dissenting). "In the private sector, purchas-

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[2] The mail fraud statute, 18 U.S.C. § 1341 states the following:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

ing agents, brokers, union leaders, and others with clear fiduciary duties to their employers or unions have been found guilty of defrauding their employers or unions by accepting kickbacks or selling confidential information." *Id.* at 2883 and n.2 (Stevens, J., dissenting).

The intangible rights were not a form of property, but the product of a fiduciary trust with the people to perform whatever duties were entrusted in those accused in a faithful, honest, and impartial manner. Subsequent to *McNally*, the Supreme Court in *dicta*, indicated that a scheme to defraud an employer of "its contractual right to his honest and faithful service" was "an interest too ethereal in itself to fall within the protection of the mail fraud statute. . . ." *Carpenter v. United States*, 108 S.Ct. 316, 320 (1987).

The Indictment and Evidence Presented

Patterson was charged in part with abusing the fiduciary trust of Kenilworth by failing to perform his duties "free from dishonesty, misconduct, fraud, and conflict of interest, and concealment of material facts. . . ." (Indictment ¶ 10.a.1). The indictment also charged him with a scheme to defraud the "Illinois Department of Insurance and the State of Illinois of their right to be fully informed and advised of the business operations of Kenilworth. . . ." (Indictment ¶ 10.b.).

If these were the only charges in the indictment, it would probably fail to state an offense under the mail fraud statute. *See United States v. Eckhardt*, No. 87-1822, slip op. at 12-13 (7th Cir. Mar. 29, 1988) (charge in indictment that defendant interferred with IRS's proper ascertainment and collection of income taxes without charging that the government was deprived or revenue fails under *McNally*). *Accord United States v. Holzer*, 840 F.2d 1343 (7th Cir. 1983); *United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987). However, here the indictment also alleges that a goal of the scheme was "[t]o obtain money by means of false and fraudulent pretenses and

representations," (Indictment ¶ 10.c.), and that "[i]t was the scheme of the defendants to utilize and operate Kenilworth for the purpose of obtaining money by improperly converting to their use Kenilworth insurance and bond premiums." (Indictment ¶ 11). This language adequately charges that a goal of this scheme was to deprive Kenilworth of more than the intangible right to the honest and faithful services of the defendants or the Department of Insurance of information.

Moreover, the proof at trial adequately established that a goal of this scheme was to siphon off the premium money from Kenilworth. Patterson argues that the Government did not pursue this case on the theory that the scheme involved the misappropriation of Kenilworth premiums. We disagree. First, the indictment clearly charges that this was a scheme to misappropriate the premiums. Paragraph 3 of the indictment sets forth various Illinois laws, the *first* states that Illinois law "[p]rohibited the misapplication or conversion of insurance premiums held by an insurance agent or broker in a fiduciary capacity. . . ." The indictment also states "[i]t was the scheme of the defendants to utilize and operate Kenilworth for the purpose of obtaining money by improperly converting to their use Kenilworth insurance and bond premiums." The Government presented a substantial amount of evidence concerning the misappropriation of the premiums, especially the testimony of Larry Nora who conducted the audit of Robco's premium trust account. The Government clearly argued in its opening and closing arguments that setting up Robco as the managing general agent was a way to get the money before it ever got to Kenilworth. *See, e.g.*, Tr. 6, 9, 809, 816, 817, 852, 857, 861.

There was certainly a great deal of argument and evidence concerning the duty defendants owed to Kenilworth, to the Illinois Department of Insurance, and to the policyholders. However, in addition to proving a scheme to defraud the Department of information and Kenilworth of the loyal services of its employees, this evidence was

relevant to prove intent to commit the fraudulent scheme. Misappropriation of the insurance premiums in and of itself would not be criminal under the mail fraud statute. It is with the specific intent to defraud that the misappropriation becomes criminal. *See United States v. Gross*, 650 F.2d 1336, 1346 (5th Cir. 1981); *United States v. McDonald*, 576 F.2d 1350, 1359 n.14 (9th Cir.), *cert. denied*, 439 U.S. 830, 99 S.Ct. 105 (1978). The Government amply proved the specific intent to defraud, in large part, by showing the blatant manipulation of the reporting requirements and the abuse of trust.

Patterson apparently realizes that the misappropriated premiums are sufficient to satisfy *McNally*, because he goes to great lengths to explain away the misappropriations in his reply brief:

> The premium money retained by Robco was an offset against commissions due Robco as a result of premium moneys paid directly by agents to Kenilworth on which Robco had a right to commissions. Furthermore these moneys were retained by Robco with the permission of Kenilworth. Although the retentions might *have technically been in violation of the statute relating to premium trust funds*, the retention was not a fraud upon Kenilworth because Kenilworth had knowledge of and acquiesced in the manner premiums received by Robco were handled.
>
> Furthermore, Kenilworth did not sustain any monetary loss as a result of the manner in which premium moneys flowed through Robco because of the many millions of dollars of premium money that was paid directly to Kenilworth by agents and on which Robco was entitled to commissions which it never received.

(Reply at 13). We rejected these same arguments at trial and we again reject them now. Illinois law provides that any unlawful withdraw from a premium trust account is a misappropriation of the insurance company's funds. Illinois established this law to protect policyholders from just

the type of unscrupulous conduct present in this case. All withdrawals in excess of Robco's 30% commission on insurance *it wrote* were misappropriations of Kenilworth's premiums. Therefore, we reject Patterson's argument to the contrary and conclude that the indictment clearly charged and the evidence presented clearly demonstrated a scheme to misappropriate property, specifically Kenilworth's insurance premiums.[3]

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[3] In the Seventh Circuit's most recent *McNally* case, it affirmed an order setting aside the mail fraud conviction of an attorney convicted under the Greylord investigation. *Ward v. United States*, No. 87-2659, slip op. (7th Cir. May 11, 1988). In *Ward*, the Seventh Circuit concluded that on appeal the government had identified a property right which, if actually presented at trial, would have supported a mail fraud or wire fraud prosecution. However, the government "failed to present facts showing that the scheme to defraud actually involved that property right." *Id.* at 6. It could be argued that, because the government brought this case in part on the theory that the scheme was to defraud the Department of information and Kenilworth of faithful services, *Ward* would require that Patterson's conviction be vacated. Nevertheless, we do not believe that would be a successful argument. As the Seventh Circuit indicated in *Ward*: "The root difficulty of the government's case is not that the case went to the jury on a completely different theory from the one argued in the [Seventh Circuit] but that the theory now pressed has no support in the record." *Id.* at 7. Unlike *Ward*, in this case, deprivation of a property right, misappropriation of Kenilworth's premiums, was charged in the indictment and proved at trial by, *inter alia*, Larry Nora's testimony. Nora conducted the audit of the premium trust account Robco had for Kenilworth's premiums. Nora testified that Patterson unlawfully withdrew money out of the premium trust account, and that money which legally belonged to Kenilworth was funneled through Robco's general operating account and then disbursed to various individuals to pay expenses. Thus, although this case was in part about defrauding the Department of information and Kenilworth of faithful services, it was also about "improperly converting to [the defendants'] use Kenilworth insurance and bond premiums." (Indictment ¶ 11).

This Court's Oral Finding

Patterson pulls out of context some comments this Court made during his attorney's closing argument and in delivering its findings of guilt and contends this proves that this Court did not find defendants had conspired to defraud Kenilworth of a property interest. Under Fed.R. Crim.P. 23(c), the court need only make a general finding and only upon request, find the facts specially. There was no request by either defendant for a finding of the facts specially. Therefore, this Court gave a general finding of guilt and did not intend that its "very brief remarks" should have been taken as a special finding. Because there seems to be no time limit under Fed.R.Crim.P. 23(c) as to the findings issued by a judge, the Court sets forth the following findings. *Cf. United States v. Brown*, 716 F.2d 457, 462 (7th Cir. 1983) (proceedings remanded to district court judge to make written findings of fact on issue necessary to convict); *United States v. Pinner*, 561 F.2d 1203, 1207 (5th Cir. 1977) (proceedings remanded to a district court judge to make specific written findings); *United States v. Ogden*, 484 F.2d 1274, 1275 (9th Cir. 1973), *cert. denied*, 416 U.S. 487, 94 S.Ct. 2391 (1974) (findings of fact issued subsequent to sentencing complied with Rule 23(c)). Although a great deal of time has passed since this case was tried, this Court has had an opportunity to refresh its memory by reviewing the transcript of the trial. Accordingly, the Court sets forth the following findings of fact on the issue of whether a victim of this scheme was fraudulently deprived of a property right. *Cf. Ingber v. Enzor*, 841 F.2d 450, 452 (2nd Cir. 1988) (in rejecting defendant's *McNally* challenge to District Judge's finding of guilt, the Second Circuit relied in part upon a clarification of the judge's trial findings issued subsequent to his initial findings).

This Court finds that one of the goals of defendants' scheme was to misappropriate Kenilworth Insurance Company premiums. Although this Court also concluded that defendants had deprived the Illinois Department of In-

surance of its intangible right to be fully informed and that the policyholders in turn were deprived of that regulation, it also concluded that Kenilworth Insurance Company was a victim of this scheme when its premiums, which were held in trust by Robco, were unlawfully withdrawn and disbursed in furtherance of this scheme. This Court also found that the mailings of the premium checks to Robert Patterson as set forth in Counts I-VIII were all in furtherance of this scheme because without the premiums, there would have been no money to misappropriate.

Conclusion

The indictment in this case properly charges defendant Robert Patterson with a scheme to defraud the Kenilworth Insurance Company of its premiums. The Government argued this scheme at trial and presented ample evidence of this scheme at trial. The Court also found that Patterson had indeed participated in the scheme to misappropriate Kenilworth premiums, and that Kenilworth was indeed a victim of this scheme in that it was defrauded of its insurance premiums held in trust by Robco. Accordingly, defendant Robert Patterson's motion to vacate his judgment of conviction and sentence is denied.[4] It is so ordered.

/s/ Marvin E. Aspen
United States District Judge

DATED 5/25/88

[4] Patterson's co-defendant, Joseph Consentino, filed a "motion to adopt" in which he moved to adopt Patterson's briefs and arguments in this motion but made no arguments of his own. Accordingly, we also deny Consentino's motion to vacate.

APPENDIX E

United States of America
vs.
JOSEPH COSENTINO, SR.

United States District Court
Northern District of
Illinois, Docket
No. 86 Cr 350-3

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date 12/04/86.

____ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

_X_ WITH COUNSEL MITCHELL CAPLAN

_X_ GUILTY, and the court being satisfied that there is a factual basis for the plea, on Counts 21, 22 and 23.
____ NOLO CONTENDERE,
_X_ NOT GUILTY, on remaining counts

There being a finding of
____ NOT GUILTY. Defendant is discharged
_X_ GUILTY.

Defendant has been convicted as charged of the offense(s) of knowingly, willfully and unlawfully did use the United States mails in furtherance of a scheme to defraud, and did fail to file income tax returns;

In violation of Title 18, United States Code, Section 1341 and Title 26, United States Code, Section 7203.

The court asked whether defendant had anything to say why judgment should not be pronounced Because no sufficient cause to the contrary was shown or appeared to

the court, the court adjudged the defendant guilty as charged and convicted and ordered that The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of NINE (9) MONTHS on superseding Count 1.

On Counts 2 through 8 and 21, 22 and 23 of the superseding indictment, the defendant is placed on probation for a period of FIVE (5) YEARS. The special conditions of probation are as follows: (1) serve THREE THOUSAND (3000) HOURS of community service; and (2) is prohibited from working or any way being involved with the insurance industry.

Said sentence on Counts 2 through 8, 21, 22 and 23 to run concurrent to each other and consecutive to the sentence imposed on Count 1. Defendant to report to the designated institution on January 12, 1987 at 9:30 a.m. The original indictment as it relates to defendant Cosentino is dismissed. Same bond to stand on appeal.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

* * * * *

/s/ MARVIN E. ASPEN
U.S. District Judge

DEC 5, 1986

APPENDIX F

[1]* IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT H. PATTERSON and
JOSEPH COSENTINO, SR.,

Defendants.

Docket No. 86 CR 350
Chicago, Illinois
October 1, 1986—10:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HON. MARVIN E. ASPEN

APPEARANCES:

For the Plaintiff:

HON. ANTON R. VALUKAS
United States Attorney, by
MR. DANIEL A. DUPRE and
MR. RUBEN CASTILLO
Assistant United States Attorneys
(219 South Dearborn Street
Chicago, Illinois 60604)

* Numbers in brackets refer to the Official Court Reporter's pagination of the Transcript of Proceedings.

For Defendant Patterson:

ROSENFELD, ROTENBERG, SCHWARTZMAN, HARFON & SHAPIRO, by
Mr. Jerome Rotenberg
(221 North LaSalle Street
Chicago, Illinois 60601)

For Defendant Cosentino:

MR. MITCHELL H. CAPLAN
(29 East Madison Street
Chicago, Illinois 60602)

Court Reporter:

MS. MARY M. GALLAGHER
(219 South Dearborn Street
Room 1944
Chicago, Illinois 60604)
(312) 663-0049

[2] THE CLERK: 86 CR 350, United States versus Robert Patterson and Joseph Cosentino.

MR. DUPRE: Good morning, your Honor. Dan Dupre and Ruben Castillo on behalf of the United States.

MR. ROTENBERG: Jerome Rotenberg on behalf of Robert Patterson, Jr.

MR. CAPLAN: Mitchell Caplan on behalf of Joseph Cosentino, your Honor.

THE COURT: I am ready to rule. I have had an opportunity to go over the exhibits as well as my notes in this case, and as far as Counts 1 through 8 are concerned, let me make these very brief remarks and I will give you my ruling.

I agree with the government, that this is not a contract case. Although under principles of contract law, and if this were a civil case, certainly the defendants in this case, if they were defendants in a civil case, might not be involved in a matter of contract liability.

There was some mention by the defense, and I think it was Mr. Caplan who mentioned it, that there is no smoking gun in this case. I agree, there isn't any smoking gun. There very rarely is in a fraud case as opposed to the more traditional type of offenses. There are also no confessions in a fraud case.

For that reason, it's rarely that a case is not decided without looking at the actions of the individuals in toto, at the circumstantial evidence, at the conduct of the parties.

In this case it seeks to me that the evidence is clear that Mr. Goepfert and Mr. Assael told the Defendants Patterson and Cosentino that they were under indictment and that [3] their roles in Kenilworth must be concealed. This was followed up on to the extent that Mr. Patterson wrote checks in the names of Goepfert and Assael as nominees in paying them moneys owed for their involvement in the company.

There was other concealment. In the November 28th handwritten agreement, that agreement corroborates other testimony in this case that the defendants intended to conceal their own roles in the Kenilworth Insurance Company/Robco relationship by the use of nominees.

Mr. Law was one stumbling block. The evidence is that he had to be bought out because there was no certainty that he would go along with the scheme as designed.

The victums [sic] in this case are the Illinois Department of Insurance which, because of the concealments, were estopped from performing the type of effective regulation that the Department was required to perform under law as well as the policy holders, who were deprived of that regulation by the Illinois Department of Insurance.

As to the mailing aspects of it, it's clear that the use of the mails was involved in Counts 1 through 8; as part of the fraud, the mails were used to send checks both to Robco and Patterson.

The defense in this case is essentially a good faith defense. In light of all the circumstantial evidence but particularly in light of the defendants' sophistication in the insurance business, that defense is not persuasive. It is not conceivable that they did not fully know of the machinations, the fraud that was being perpetrated on the Illinois Department of [4] Insurance and the policyholders of Kenilworth.

For all of these reasons there will be a finding of guilty in Counts 1 through 8 as to both defendants.

As to Count 24, the use of interstate commerce to unlawfully aid the unlawful possession of a controlled substance, this count is premised on the testimony of Agent Vaules and the testimony of Mr. Mitchell. There is no documentary, tangible evidence; essentially it is just two conversations.

Mr. Dupre characterized Mitchell's testimony in another context as—and I quote him—"suffers from selective recall." I share that evaluation of Mr. Mitchell's testimony. Mr. Mitchell testified cautiously and obviously in his own interest in this case. I certainly would not convict anybody on the basis of Mr. Mitchell's testimony alone.

The question then is, what is the effect of Agent Vaules' testimony? I have no question with the credibility of Agent Vaules, however, looking at his testimony I think it is important to note that the agent did not follow up on a drug conversation with the Defendant Cosentino. This, I suppose, could be indicative that the conversation, perhaps in his view or perhaps even taken on its face value, is not a serious and necessarily incriminating conversation. It's true that because of other circumstances, perhaps the agent could not follow up on these conversations. I am not saying he was negligent in not doing so, but the fact remains that there was no follow-up.

Based upon these two conversations, in my view the evidence is much too tenuous to convict the Defendant Cosentino beyond a reasonable doubt as to Count 24, and

for that reason there [5] will be a finding of not guilty as to that count.

I am going to enter judgment on Counts 1 through 8 and on Count 24 as I have indicated. I am going to order a pre-sentence investigation for both defendants.

I am going to allow the same bond to stand in the interim. We will set this down for a sentencing hearing on November the 13th at 9:30, if that's convenient.

MR. CAPLAN: That is a good day, Judge.

THE COURT: Thursday morning.

MR. DUPRE: That's fine, Judge.

THE COURT: Thank you very much.

MR. DUPRE: Thank you.

THE COURT: I have your exhibits and I will ask each side to keep custody of its own exhibits and you can pick them up in my chambers whenever you're ready.

MR. CAPLAN: Thank you.

CERTIFICATE

I HEREBY CERTIFY that the foregoing is a full, true and correct transcript of proceedings had at the hearing of the within matter on the date aforesaid.

/s/ MARY M. GALLAGHER
Official Court Reporter
U.S. District Court
Northern District of Illinois
Eastern Division

10/7/86
Date

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

vs.

CHESTER MITCHELL, JR., ROBERT PATTERSON, JOSEPH COSENTINO, SR., JACK V. GOEPFERT and WILLARD HAYNE

No. 86 CR 350—Violation: Title 18, United States Code, Sections 1341, 1343 and 2341; Title 26, United States Code, Section 7203

The SPECIAL DECEMBER 1983 GRAND JURY charges:

At all times material herein:

1. The Kenilworth Insurance Company (hereafter referred to Kenilworth) was an insurance company authorized to do business in Illinois.

2. All insurance companies authorized to do business in Illinois were subject to the supervision and regulations of the Illinois Department of Insurance.

3. There was in force and effect statutes of the State of Illinois and regulations of the Illinois Department of Insurance, which:

a. Prohibited the misapplication or conversion of insurance premiums held by an insurance agent or broker in a fiduciary capacity, and

b. Prohibited the sale or exchange of stock of an insurance company without the approval of the Director of the Department of Insurance, and

c. Precluded the execution of an exclusive agency agreement by an insurance company without the approval of the Director of the Department of Insurance.

4. There was in force and effect the Illinois Insurance Guarantee Fund which paid claims of member companies that became insolvent.

5. Illinois law required every insurance company doing business in Illinois to participate in the Illinois Guarantee Fund.

6. CHESTER MITCHELL, JR. was the President and stockholder of Kenilworth.

7. ROBERT PATTERSON was an insurance broker licensed by the State of Illinois with offices at 222 West Adams, Chicago, Illinois.

8. JOSEPH COSENTINO SR., was an insurance broker licensed by the State of Illinois with offices in Chicago, Illinois.

9. JACK V. GOEPFERT was a convicted felon.

10. Beginning in 1981, the exact date being unknown, and continuing through in or about April, 1982, in the Northern District of Illinois, Eastern Division, and elsewhere,

CHESTER MITCHELL, JR.,
ROBERT PATTERSON,
JOSEPH COSENTINO, SR., and
JACK V. GOEPFERT,

defendants herein, and other persons known and unknown to the grand jury devised and intended to devise and participated in a scheme:

a. To defraud Kenilworth, and its policy holders and claimants of their right;

1. To the conscientious, loyal, honest, faithful and impartial services, decisions, actions, and performance of duties by defendant CHESTER MITCHELL, JR., in his capacity as President of Kenilworth and defendants ROBERT PATTERSON, JOSEPH COSENTINO SR., and JACK V. GOEPFERT, in their capacities as agents and partners in Kenilworth, free from dishonesty, misconduct, fraud, and conflict of interest, and concealment of material facts; and

2. To have the business affairs of Kenilworth conducted honestly, impartially, free from dishonesty, misconduct, fraud, conflict of interest and concealment of material facts by defendants, CHESTER MITCHELL, JR., President of Kenilworth, and ROBERT PATTERSON, JOSEPH COSENTINO SR., and JACK V. GOEPFERT as partners and agents of Kenilworth; and

b. To defraud the Illinois Department of Insurance and the State of Illinois of their right to be fully informed and advised of the business operations of Kenilworth in order to allow the Illinois Department of Insurance and the State of Illinois to carry out the functions of overseeing, regulating and administering the insurance industry in the State of Illinois and of protecting the welfare and interests of the citizens of the State of Illinois in the field of insurance; and

c. To obtain money by means of false and fraudulent pretenses and representations.

11. It was the scheme of the defendants to utilize and operate Kenilworth for the purpose of obtaining money by improperly converting to their use Kenilworth insurance and bond premiums.

12. It was part of the scheme that defendant JOSEPH COSENTINO SR., agreed to buy stock of the Kenilworth Insurance Company for $250,000.

13. It was further a part of the scheme that defendant JOSEPH COSENTINO SR., would and did execute a purchase agreement and pay $50,000 in earnest money towards the purchase of Kenilworth's stock.

14. It was further a part of the scheme that defendants CHESTER MITCHELL, JR. and JOSEPH COSENTINO SR., concealed from the Illinois Department of Insurance JOSEPH COSENTINO SR., efforts to purchase Kenilworth stock by failing to advise the Department of Insurance of the purchase agreement.

15. It was further a part of the scheme that defendants CHESTER MITCHELL JR. and JOSEPH COSENTINO SR. concealed from the Illinois Department of Insurance JOSEPH COSENTINO SR's involvement in Kenilworth by executing a second purchase agreement listing CHESTER MITCHELL JR. as the purchaser of Kenilworth stock knowing full well the Illinois Department of Insurance would scrutinize the purchase by JOSEPH COSENTINO SR. if known.

16. It was further a part of the scheme that defendants CHESTER MITCHELL, JR. and JACK GOEPFERT used $200,000 of insurance premiums to acquire stock in Kenilworth in the name of CHESTER MITCHELL, JR.

17. It was further a part of the scheme that the defendants concealed from the Illinois Department of Insurance the receipt of $200,000 and use of insurance premiums for the purchase of Kenilworth stock.

18. It was further a part of the scheme that defendant CHESTER MITCHELL, JR. agreed to sell defendants ROBERT PATTERSON, JOSEPH COSENTINO and JACK V. GOEPFERT each twenty-five percent (25%) of his stock in the Kenilworth.

19. It was further a part of the scheme that the defendants concealed from the Illinois Department of Insurance their agreement to purchase the Kenilworth stock.

20. It was further a part of the scheme that defendants CHESTER MITCHELL, JR., ROBERT PATTERSON, JOSEPH COSENTINO and JACK V. GOEPFERT agreed to conceal from the Illinois Department of Insurance the involvement of JACK V. GOEPFERT and Allen Assael in Kenilworth, knowing full well that the Illinois Department

of Insurance would prohibit GOEPFERT's and Assael's participation in Kenilworth, in that GOEPFERT was a convicted felon, and further that GOEPFERT and Assael were then under indictment in the United States District Court in the Southern District of New York for an insurance-related fraud.

21. It was further part of the scheme that the defendants agreed that Kenilworth should award an exclusive agency on agreement to ROBCO Worldwide Facilities, owned by defendant PATTERSON.

22. It was further part of the scheme that the defendants would and did conceal from the Illinois Department of Insurance the ROBCO exclusive agency agreement.

23. It was further part of the scheme that pursuant to the agency agreement ROBCO acted as an agent for Kenilworth and received premiums on Kenilworth insurance policies.

24. It was further a part of the scheme that the defendants would cause Kenilworth policies to be underwritten for substantially lower premiums for the purpose of generating premium income for the ROBCO agency.

25. It was further part of the scheme that the defendants caused payments for Kenilworth insurance premiums to be delivered to the offices of ROBCO and defendant PATTERSON through the United States mails.

26. It was further a part of the scheme that defendant PATTERSON improperly converted premium money received on Kenilworth policies by distributing the premium money to defendants CHESTER MITCHELL, JR., JOSEPH COSENTINO SR., JACK V. GOEPFERT and himself.

27. It was further a part of the scheme that defendant CHESTER MITCHELL, JR. concealed his receipt of money from ROBCO by directing payments to be made in the name of his son Clay Mitchell.

28. It was further a part of the scheme that $34,000 was paid in the name of Clay Mitchell for CHESTER MITCHELL JR.

29. It was further a part of the scheme that JOSEPH COSENTINO SR. concealed his receipt of moneys from ROBCO by directing payments to be made in the name of his wife Judith Gibbs.

30. It was further a part of the scheme that $31,000 was paid in the name of Judith Gibbs for JOSEPH COSENTINO SR.

31. It was further a part of the scheme that JACK GOEPFERT would conceal his receipt of money from Kenilworth by directing payments to be made in the name of his wife Catherine Sergel.

32. It was further a part of the scheme that $47,000 was paid in the name of Catherine Sergel for JACK V. GOEPFERT.

33. On or about January 28, 1982, in the Northern District of Illinois, Eastern Division,

CHESTER MITCHELL, JR.,
ROBERT PATTERSON,
JOSEPH COSENTINO, SR., and
JACK V. GOEPFERT,

defendants herein, for the purpose of executing the aforementioned scheme and attempting to do so, knowingly caused an envelope addressed to ROBERT PATTERSON, containing a check made payable to Robert H. Patterson Insurance in the amount of $3,108.61 to be delivered by the United States Postal Service according to the directions on that envelope;

In violation of Title 18, United States Code, Section 1341.

COUNT TWO

The SPECIAL DECEMBER 1983 GRAND JURY further charges:

1. That paragraphs 1 through 32 of Count One are herein incorporated and realleged.

2. On or about March 1, 1982, in the Northern District of Illinois, Eastern Division,

CHESTER MITCHELL, JR.,
ROBERT PATTERSON,
JOSEPH COSENTINO, and
JACK V. GOEPFERT,

defendants herein, for the purpose of executing the aforementioned scheme and attempting to do so, knowingly caused an envelope addressed to ROBERT PATTERSON containing a check made payable to Robert H. Patterson Insurance in the amount of $2,654.70 to be delivered by the United States Postal Service according to the directions on that envelope;

In violation of Title 18, United States Code, Section 1341.

COUNT THREE

The SPECIAL DECEMBER 1983 GRAND JURY further charges:

1. That paragraphs 1 through 32 of Count One are herein incorporated and realleged.

2. On or about March 16, 1982, in the Northern District of Illinois, Eastern Division,

CHESTER MITCHELL, JR.,
ROBERT PATTERSON,
JOSEPH COSENTINO, and
JACK V. GOEPFERT,

defendants herein, for the purpose of executing the aforementioned scheme and attempting to do so, knowingly caused an envelope addressed to ROBERT PATTERSON containing a check made payable to Robert H. Patterson Insurance in the amount of $7,240.50 to be delivered by the United States Postal Service according to the directions on that envelope;

In violation of Title 18, United States Code, Section 1341.

COUNT FOUR

The SPECIAL DECEMBER 1983 GRAND JURY further charges:

1. That paragraphs 1 through 32 of Count One are herein incorporated and realleged.

2. On or about February 9, 1982, in the Northern District of Illinois, Eastern Division, and elsewhere,

CHESTER MITCHELL, JR.,
ROBERT PATTERSON,
JOSEPH COSENTINO, and
JACK V. GOEPFERT,

defendants herein, for the purpose of executing the aforementioned scheme and attempting to do so, knowingly caused an envelope addressed to ROBERT PATTERSON containing a check made payable to Robert H. Patterson Insurance in the amount of $31,350.00 to be delivered by the United States Postal Service according to the directions on that envelope;

In violation of Title 18, United States Code, Section 1341.

COUNT FIVE

The SPECIAL DECEMBER 1983 GRAND JURY further charges:

1. That paragraphs 1 through 32 of Count One are herein incorporated and realleged.

2. On or about March 18, 1982, in the Northern District of Illinois, Eastern Division,

CHESTER MITCHELL, JR.,
ROBERT PATTERSON,
JOSEPH COSENTINO, and
JACK V. GOEPFERT,

defendants herein, for the purpose of executing the aforementioned scheme and attempting to do so, knowingly caused an envelope addressed to ROBERT PATTERSON

containing a check made payable to Robert H. Patterson Insurance in the amount of $8,576.50 to be delivered by the United States Postal Service according to the directions on that envelope;

In violation of Title 18, United States Code, Section 1341.

COUNT SIX

The SPECIAL DECEMBER 1983 GRAND JURY further charges:

1. That paragraphs 1 through 32 of Count One are herein incorporated and realleged.

2. On or about January 27, 1982, in the Northern District of Illinois, Eastern Division,

CHESTER MITCHELL, JR.,
ROBERT PATTERSON,
JOSEPH COSENTINO, and
JACK V. GOEPFERT,

defendants herein, for the purpose of executing the aforementioned scheme and attempting to do so, knowingly caused an envelope addressed to ROBERT PATTERSON containing a check made payable to Robert H. Patterson Insurance in the amount of $9,900.00 to be delivered by the United States Postal Service according to the directions on that envelope;

In violation of Title 18, United States Code, Section 1341.

COUNT SEVEN

The SPECIAL DECEMBER 1983 GRAND JURY further charges:

1. That paragraphs 1 through 32 of Count One are herein incorporated and realleged.

2. On or about March 10, 1982, in the Northern District of Illinois, Eastern Division, and elsewhere,

CHESTER MITCHELL, JR.,
ROBERT PATTERSON,
JOSEPH COSENTINO, and
JACK V. GOEPFERT,

defendants herein, for the purpose of executing the aforementioned scheme and attempting to do so, knowingly caused an envelope addressed to ROBERT PATTERSON containing a check made payable to ROBCO Worldwide Services in the amount of $39,527.35 to be delivered by the United States Postal Service according to the directions on that envelope;

In violation of Title 18, United States Code, Section 1341.

COUNT EIGHT

The SPECIAL DECEMBER 1983 GRAND JURY further charges:

1. That paragraphs 1 through 32 of Count One are herein incorporated and realleged.

2. On or about January 21, 1982, in the Northern District of Illinois, Eastern Division, and elsewhere,

CHESTER MITCHELL, JR.,
ROBERT PATTERSON,
JOSEPH COSENTINO, and
JACK V. GOEPFERT,

defendants herein, for the purpose of executing the aforementioned scheme and attempting to do so, knowingly caused an envelope addressed to ROBERT PATTERSON containing a check made payable to Robert H. Patterson Insurance in the amount of $2,227.50 to be delivered by the United States Postal Service according to the directions on that envelope;

In violation of Title 18, United States Code, Section 1341.

APPENDIX H

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT H. PATTERSON, and JOSEPH COSENTINO,

Defendants-Appellants.

Nos. 86-3098, 86-3090—Consolidated

MOTION TO EXPAND ORDER OF REMAND ENTERED ON APRIL 30, 1987

NOW COMES ROBERT H. PATTERSON, defendant-appellant, herein, by his attorney, JEROME ROTENBERG, and shows unto the court the following:

1. On April 30, 1987, this court entered an order remanding this appeal in part to the District Court to obtain a ruling on a challenge to the validity of the indictment returned in this cause.

2. The District Court has not as yet entered a ruling on the motion challenging the validity of the indictment.

3. On October 1, 1986, the defendant-appellant was found guilty of eight counts of mail fraud, Title 18, Section 1341, United States Code, by the District Court judge, sitting without a jury.

4. The indictment in this cause charged the defendant-appellant with having devised and intended to devise and participated in a scheme:

"a. To defraud Kenilworth, and its policy holders and claimants of their right;

1. To the conscientious, loyal, honest, faithful and impartial services, decisions, actions, and performance of duties by defendant CHESTER MITCHELL, JR., in his capacity as President of Kenilworth and defendants ROBERT PATTERSON, JOSEPH COSENTINO, SR., and JACK V. GOEPFERT, in their capacities as agents and partners in Kenilworth, free from dishonesty, misconduct, fraud, and conflict of interest, and concealment of material facts; and

2. To have the business affairs of Kenilworth conducted honestly, impartially, free from dishonesty, misconduct, fraud, conflict of interest and concealment of material facts by defendants, CHESTER MITCHELL, JR , President of Kenilworth, and ROBERT PATTERSON. JOSEPH COSENTINO SR., and JACK V. GOEPFERT as partners and agents of Kenilworth: and

b. To defraud the Illinois Department of Insurance and the State of Illinois of their right to be fully informed and advised of the business operations of Kenilworth in order to allow the Illinois Department of Insurance and the State of Illinois to carry out the functions of overseeing, regulating and administering the insurance industry in the State of Illinois and of protecting the welfare and interests of the citizens of the State of Illinois in the field of insurance; and

c. To obtain money by means of false and fraudulent pretenses and representations."

A copy of the pertinent sections of the indictment is attached hereto as Exhibit "A."

5. In finding the defendant-appellant guilty, the District Court judge stated:

"The victums (sic) in this case are the Illinois Department of Insurance which, because of the concealments, were estopped from performing the type of effective regulation that the Department was required to perform under law as well as the policyholders, who were deprived of that regulation by the Illinois Department of Insurance."

A copy of the District Court judge's oral findings is attached hereto as Exhibit "B."

6. No evidence was presented at the trial by the government to prove the scheme to obtain money by means of false and fraudulent pretenses and representations. During closing argument when defense counsel started to argue the lack of evidence pertaining to this scheme, the trial judge interrupted counsel and stated (T.[1] 838):

> "THE COURT: I don't think the government has even argued that particular fraud, so—
> MR. ROTENBERG: They are conceding that it wasn't there.
> THE COURT: So I think for purpose of this argument, you do not have to go through that."

7. On June 24, 1987, after this cause had been remanded, the United States Supreme Court, in the case of *Mc Nally v. United States*, 107 S. Ct. 2875, 2879, held that the mail fraud statute protects property rights but does not refer to the intangible right of the citizenry to good government.

8. On August 6, 1987, in the case of *United States v. Gimbel*, No. 86-1808, this court reversed the mail fraud conviction of the defendant on the grounds that the indictment did not state an offense under the mail fraud statute because it did not charge that the scheme deprived the Treasury Department of money or property. (Page

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[1]. "T" refers to the transcript of proceedings previously filed with this court.

9 of Slip Opinion). This decision was based on the *Mc Nally* case ruling that the mail fraud statute does not proscribe schemes to defraud individuals or entities of intangible rights.

9. The schemes charged in paragraphs 10 a and 10 b of the instant indictment do not charge a scheme to deprive Kenilworth, its policy Holders and claimants or the Department of Insurance of "money or property."

10. The oral findings upon which the District Court judge convicted the defendant-appellant relate to "intangible rights" and not "property rights." (See Exhibit "B" attached hereto).

Wherefore, ROBERT H. PATTERSON, defendant-appellant herein, moves that the remand order of April 30, 1987, be expanded so as to remand this cause to the District Court for a determination of the effect, if any, the cases of *United States v. Mc Nally*, 107 S. Ct. 2875 and *United States v. Gimbel*, No. 86-1808, Slip Opinion dated August 6, 1987, have upon this cause.

ROBERT H. PATTERSON

By: /s/ JEROME ROTENBERG
JEROME ROTENBERG
221 North LaSalle Street
Chicago, Illinois 60601
372-6058
Attorney for Robert H. Patterson

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT H. PATTERSON,

Defendant.

No. 86 CR 350—JUDGE ASPEN

MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE

Now comes Robert H. Patterson, one of the defendants herein, by his attorney, Jerome Rotenberg, and shows unto the court the following:

1. This defendant was convicted by the court, sitting without a jury, on October 1, 1986, of Counts 1 through 8 of this indictment; and he was sentenced by the court on December 4, 1986.

2. On April 30, 1987, the United States Court of Appeals for the Seventh Circuit entered an order remanding this cause to this court "to allow appellants to obtain a ruling on their challenge to the validity of their indictment".

3. This court has not as yet entered a ruling on the defendant's motion challenging the validity of the indictment in this cause.

4. On September 11, 1987, the Court of Appeals entered an order expanding the April 30, 1987, remand order and directed this court to "include in its proceedings a determination of the effect, if any, of *United States v. McNally*, 107 S.Ct. 2875 (1987) and *United States v. Gimbel*, Slip Op. No. 86-1808 (7th Cir. August 6, 1987)." A copy of said order is attached hereto as Exhibit "A".

5. Defendant was convicted of violations of the mail fraud statute, Title 18, United States Code, Section 1341, in that he and others were alleged to have devised, intended to devise and participated in a scheme to defraud policy holders of Kenilworth and the Illinois Department of Insurance of various intangible rights. In its oral findings this court specifically stated:

> "The victums [sic] in this case are the Illinois Department of Insurance which, because of the concealments, were estopped from performing the type of effective regulation that the Department was required to perform under law as well as the policyholders, who were deprived of that regulation by the Illinois Department of Insurance."

6. In the recent cases of *McNally v. United States*, 107 S.Ct. 2875 (1987) and *United States v. Gimbel*, Slip Op. No. 86-1808 (7th Cir. August 6, 1987), the United States Supreme Court and the Seventh Circuit held that the mail fraud statute is limited in scope to the protection of property rights and does not apply to schemes to defraud individuals or entities of intangible rights.

7. A memorandum of law is filed herein in support of this motion.

Wherefore, this defendant moves that this court vacate and set aside his judgment of conviction and sentence, and enter a judgment of acquittal.

ROBERT H. PATTERSON

By: /s/ JEROME ROTENBERG
JEROME ROTENBERG
Attorney for Defendant

APPENDIX J

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 11, 1987.

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*

Nos. 86-3090 and 86-3098

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JOSEPH COSENTINO, SR., and
ROBERT H. PATTERSON,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 CR 350—**Marvin E. Aspen**, *Judge.*

This matter comes before the court for its consideration of the following documents:

1. "MOTION TO EXPAND ORDER OF REMAND ENTERED ON APRIL 30, 1987" filed herein on August

14, 1987, by counsel for the defendant-appellant Robert H. Patterson.

2. "GOVERNMENT'S RESPONSE TO DEFENDANTS-APPELLANTS' MOTION TO EXPAND ORDER OF REMAND ENTERED ON APRIL 30, 1987" filed herein on August 31, 1987, by counsel for the plaintiff-appellee.

On consideration thereof,

IT IS ORDERED that the MOTION TO EXPAND ORDER OF REMAND ENTERED ON APRIL 30, 1987, is GRANTED and the order of remand entered on April 30, 1987 is expanded and the district court shall include in its proceedings a determination of the effect, if any, of *United States v. McNally*, 107 S.Ct. 2875 (1987) and *United States v. Gimbel*, Slip Op. No. 86-1808 (7th Cir. August 6, 1987).

APPENDIX K

[838]* Rotenberg - Closing

companies that never filed them. But that in and of itself would not perpetrate any fraud.

Then we go to the last one, which was to obtain money by means of false and fraudulent pretenses and representations. And this record is silent as to any misrepresentations or fraudulent pretenses or representations.

And as far as the obtaining of money is concerned here, where did that money come from? It came from policyholders and—

THE COURT: I don't think the government has even argued that particular fraud, so—

MR. ROTENBERG: They are conceding that it wasn't there.

THE COURT: So I think for purposes of this argument, you do not have to go through that.

MR. ROTENBERG: All right.

Then if we are not arguing that, then we get to the actual counts, the mailings.

None of those mailings were for the purpose of furthering the scheme to defraud the Department of Insurance. In fact, there is a lack of mailings. That is why they are arguing that there weren't any mailings to the Department of Insurance, therefore there was a concealment.

And the same way as to the other scheme that is alleged in the indictment, to defraud policyholders.

* Number in brackets refers to the Official Court Reporter's pagination of the Transcript of Proceedings.

APPENDIX L

CONSTITUTION, RULES AND STATUTES

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

Ill. Rev. Stat. Ch. 73, § 743.4

743.4. Acquisition of control of or merger with domestic company

§ 131.4. Acquisition of control of or merger with domestic company. No person other than the issuer may make a tender for or a request or invitation for tenders of, or enter into an agreement to exchange securities for or ac-

quire in the open market or otherwise, any voting security of a domestic company if, after the consummation thereof, that person would, directly or indirectly, (or by conversion or by exercise of any right to acquire) be in control of the company, and no person may enter into an agreement to merge or consolidate with or otherwise to acquire control of a domestic company, unless, at the time any offer, request, or invitation is made or any agreement is entered into, or prior to the acquisition of the securities if no offer or agreement is involved, the person has filed with the Director and has sent to the company a statement containing the information required in Sections 131.5 and 131.6 and the company has provided notice to its security-holders as required in Section 131.9, and the offer, request, invitation, agreement or acquisition has been approved by the Director in the manner prescribed. For purposes of this paragraph a domestic company includes any other person controlling a domestic company and any other person in the holding company system which, directly, or indirectly through one or more intermediaries, owns 10 percent or more of the outstanding voting securities of a domestic company unless the Director concludes, pursuant to a Statement filed with the Director, prior to the acquisition, on forms prescribed by him, that:

(1) such transaction will not result in the change of control of the domestic company; or

(2) the person which is subject to the acquisition has assets in excess of $1,000,000 and shareholders of record of 500 or more is either directly or through its affiliates primarily engaged in business other than insurance; or

(3) the acquisition of, or attempt to acquire control of, such other person is subject to requirements in the jurisdiction of its domicile which are substantially similar to those contained in this Section and Sections 131.5 through 131.12.

Amended by P.A. 82-498, § 4, eff. Sept. 16, 1981.

Ill. Rev. Stat. Ch. 73, § 748

748. Annual statement

§ 136. Annual Statement. (1) Every company doing business in this State shall file with the Director by March 1st in each year a financial statement for the year ending December 31st immediately preceding on forms prescribed by the Director, which shall conform substantially to the form of statement adopted by the National Association of Insurance Commissioners and in use on the effective date of this Code. The Director shall have power to make such modifications and additions in this form as he may deem desirable or necessary to ascertain the condition and affairs of the company. The Director shall have authority to extend the time for filing any statement by any company for reasons which he considers good and sufficient. In every such statement the admitted assets shall be shown at the actual values as of the last day of the preceding year, in accordance with Section 124.6. Such statement shall be verified by oaths of the president and secretary of the company, or, in their absence, by 2 other principal officers. In addition, any company transacting business in this State may be required by the Director, when he considers such action to be necessary and appropriate for the protection of policyholders, creditors, shareholders or claimants, to file, within 60 days after mailing to the company of a notice that such is required, a supplemental summary statement as of the last day of any calendar month occurring during the 100 days next preceding the mailing of such notice designated by him on forms prescribed and furnished by the Director. No company shall be required to file more than 4 supplemental summary statements during any consecutive 12 month period. The Director may require supplemental summary statements to be certified by an independent actuary deemed competent by the Director or by an independent certified public accountant.

(2) The statement of an alien company shall embrace only its condition and transactions in the United States

and shall be verified by the oaths of its resident manager or principal representative in the United States, except that in the case of any life company organized under the laws of Canada or any province thereof, such statement may be verified by the oaths of any of its principal officers designated for that purpose by its board of directors.

(3) For the information of the public generally the Director shall cause an abstract of the information contained in the annual statement to be made available to the public as soon as practicable after filing with the Department, by printing such abstracts in pamphlet tabular form for free general distribution by the Department, or by such other publication in the city of Springfield or in the city of Chicago as may be reasonably necessary more fully to inform the public of the financial condition of companies transacting business in the State.

Amended by P.A. 81-735, § 1, eff. Jan. 1, 1980.

Ill. Rev. Stat. Ch. 73, § 753

753. Agency contracts

§ 141. Agency Contracts. (1) No domestic company authorized to do an insurance business in this State shall make a contract with any person (different legal entities, directly or indirectly owned or controlled by the same person shall be considered as a person within the meaning of this Section) whereby such person is granted the right or privilege to solicit, procure, write or produce a major part of the insurance business for such company and collect premiums therefor unless such contract is filed with and approved by the Director. Failure of the Director to disapprove any such contract within thirty days after the same shall be filed with him, shall constitute his approval thereof. Such disapproval shall be in writing, stating the reasons therefor and a copy thereof delivered to the company.

(2) The Director shall not approve any such contract which

(a) subjects the company to excessive charges for expenses or commissions; or

(b) vests in the agent or agency company any control over the management of the affairs of the insurance company to the exclusion of the board of directors of the insurance company; or

(c) gives to such person, the right to solicit, procure, write or produce a major part of the insurance business for such insurance company and collect the premiums for such unreasonable period as may jeopardize the security of policyholders.

(3) The Director, for the purpose of ascertaining the assets, conditions and affairs of any person having a contract as provided in subsection (1), may examine the books, records, documents and assets of such person directly relating thereto.

(4) The Director may, after a hearing held pursuant to Section 401, withdraw his approval of any agency contract theretofore approved by him, if he finds that the bases of his original approval no longer exist, or that the contract has, in actual operation, shown itself to be subject to disapproval on any of the grounds referred to in subsection (2) above.

Amended by Laws 1967, p. 2058, eff. July 26, 1967.

Ill. Rev. Stat. Ch. 73, § 1005.1

1005.1. Unearned premium reserve

§ 393.1. Unearned Premium Reserve. (1) Every insurance company authorized in this State to transact any of the kinds of business described in Class 3 of Section 4 shall maintain an unearned premium reserve on all policies in force which reserve shall be charged as a liability. The portions of the gross premiums in force, after deducting bona fide reinsurance in authorized companies, which shall be held as a premium reserve, shall never be less in the aggregate than the company's actual liability to all its in-

sureds for the return of gross unearned premiums. In the calculation of the company's actual liability to all its insureds, the reserve shall be computed pursuant to the method commonly referred to as the monthly pro rata method; provided, however, that the Director may require that such reserve shall be equal to the unearned portions of the gross premiums in force, after deducting reinsurance in authorized companies, in which case the reserve shall be computed on each respective risk from the date of the issuance of the policy.

(2) Before any reinsurance may qualify as a deduction from a company's unearned premium reserve, the accepting company shall assume full liability for the amount of coverage which the ceding company guaranteed for the portions of premiums which it ceded to the accepting company.

Added by Laws, p. 1745, eff. July 18, 1967.

Ill. Rev. Stat. Ch. 73, § 1065.37

Definition. Agent and Broker

§ 490. As used in this Article, unless the context clearly otherwise requires:

(a) "Insurance agent" means an individual, firm, partnership, association or corporation appointed by an insurer to solicit, negotiate or bind coverages for or on applications or policies of insurance on its behalf, covering property or risks located in this State.

An individual, firm, partnership, association or corporation, not licensed as an insurance agent, who solicits insurance policies on behalf of an insurer shall be an insurance agent within the intent of this Article, and any company compensating an individual, firm, partnership, association or corporation, through any of its officers, agents or employees, for soliciting policies of insurance shall accept and acknowledge the individual, firm, partnership, association or corporation as its insurance agent. Any insurance agent may concurrently hold a license as a broker.

(b) "Insurance broker" means an individual, firm, partnership, association or corporation, while not acting as a duly licensed insurance agent, who solicits, negotiates, procures, renews or continues a policy of insurance on behalf of insureds or prospective insureds other than himself.

Such individual, firm, partnership, association or corporation, who is not licensed as an insurance broker and who solicits, negotiates, procures, renews or continues a policy of insurance on behalf of insureds or prospective insureds other than himself, shall be an insurance broker within the intent of this Article. An insurance broker may concurrently hold a license as an agent.

(c) For the purpose of this Article, all references to insurance shall include annuities, except as otherwise set forth.

Amended by P.A. 80-1028, § 1, eff. Oct. 1, 1977.

Ill. Rev. Stat. Ch. 73, § 1065.52

1065.52. **Portion of premium held by agent or broker in fiduciary capacity** - Broker's authority to collect premiums.

§ 505. Portion of premium held by agent or broker in fiduciary capacity - Broker's authority to collect premiums. Any premiums or other monies which an agent or broker collects from an insured and which are to be paid to the agent's or broker's employer, a company, or its agents because of the assumption of liability through the issuance of policies or contracts for insurance, shall be held by the agent or broker in a fiduciary capacity and shall not be misappropriated or converted to his own use or illegally withheld by the agent or broker.

Any company which directly or through its agents delivers in this State to any insurance broker a policy or contract for insurance pursuant to the application or request of such broker, acting for an insured other than himself, shall be deemed to have authorized such broker

to receive on its behalf payment of any premium which is due on such policy or contract for insurance at the time of its issuance or delivery or which becomes due thereon not more than 90 days thereafter.

In the case of an open accounts receivable with the balance payable to an agent or broker within a specified period of 90 days or less, and the balance is not fully paid within such period, a late charge not exceeding 1½% per month may be added by the agent or broker to the unpaid balance to induce payment of the premium.

Whenever an agent or broker knowingly misappropriates or converts to his own use or illegally withholds premiums, in the amount of $150 or less he is guilty of a Class A misdemeanor and for a second and subsequent violation he is guilty of a Class 4 felony; when an agent or broker knowingly misappropriates or converts to his own use or illegally withholds premiums in excess of the amount of $150 he is guilty of a Class 3 felony.

Amended by P.A. 82-355, § 1, eff. Jan. 1, 1982.

Title 18 U.S.C. § 1341

Ill. Rev. Stat. Ch. 73, § 1065.82

Purpose

§ 532. Purpose. The purpose of this Article is to provide a mechanism for the payment of covered claims under certain insurance policies, to avoid excessive delay in payment, to avoid financial loss to claimants or policyholders because of the entry of an Order of Liquidation against an insolvent company, and to provide a Fund to assess the cost of such protection among member companies.

Amended by P.A. 85-576, § 1, eff. Sept. 18, 1987.

Ill. Rev. Stat. Ch. 73, § 1065.84-1

Fund Defined

§ 534.1. "Fund" means the Illinois Insurance Guaranty Fund created by this Article.

Added by P.A. 77-305, eff. July 21, 1971.

Ill. Rev. Stat. Ch. 73, § 1065.84-3

Covered claim and unearned premium defined.

§ 534.3. (a) "Covered claim" means an unpaid claim for a loss arising out of and within the coverage of an insurance policy to which this Article applies and which is in force at the time of the occurrence giving rise to the unpaid claim, including claims presented during any extended discovery period which was purchased from the company before the entry of a liquidation order or which is purchased or obtained from the liquidator after the entry of a liquidation order, made by a person insured under such policy or by a person suffering injury or damage for which a person insured under such policy is legally liable, and for unearned premium, if:

(i) The company issuing the policy becomes an insolvent company as defined in Section 534.4 after the effective date of this Article; and

(ii) The claimant or insured is a resident of this State at the time of the insured occurrence, or the property from which a first party claim for damage to property arises is permanently located in this State or, in the case of an unearned premium claim, the policyholder is a resident of this State at the time the policy was issued; provided, that for entities other than an individual, the residence of a claimant or insured is the state in which its principal place of business is located at the time of the insured event.

(b) "Covered claim" does not include:

(i) any amount in excess of the applicable limits of liability provided by an insurance policy to which this Article applies; nor

(ii) any claim for punitive or exemplary damages; nor

(iii) any first party claim by an insured who is an affiliate of the insolvent company; nor

(iv) any first party claim by an insured whose net worth on December 31 of the year next preceding the date the insurer becomes an insolvent insurer exceeds $50 million; provided that an insured's net worth on such date shall be deemed to include the aggregate net worth of the insured and all of its affiliates as calculated on a consolidated basis; nor

(v) any claim for any amount due any reinsurer, insurer, insurance pool, or underwriting association as subrogated recoveries, reinsurance recoverables, contribution, indemnification or otherwise. No such claim held by a reinsurer, insurer, insurance pool, or underwriting association may be asserted in any legal action against a person insured under a policy issued by an insolvent company other than to the extent such claim exceeds the Fund obligation limitations set forth in Section 537.2 of this Code.

(c) "Unearned Premium" means the premium for the unexpired period of a policy which has been terminated prior to the expiration of the period for which premium has been paid and does not mean premium which is returnable to the insured for any other reason.

Amended by P.A. 84-1431, Art. 11, § 1, eff. Nov. 25, 1986; P.A. 85-576, § 1, eff. Sept. 18, 1987.

Ill. Rev. Stat. Ch. 73, § 1065.87-2

Obligations of Fund - Limitations

§ 537.2. The Fund shall be obligated to the extent of the covered claims existing prior to the entry of an Order of Liquidation against an insolvent company and arising

within 30 days after the entry of such Order, or before the policy expiration date if less than 30 days after the entry of such Order, or before the insured replaces the policy or on request effects cancellation, if he does so within 30 days after the entry of such Order. If the entry of an Order of Liquidation occurs on or after October 1, 1975 and before October 1, 1977, such obligations shall not: i) exceed $100,000, or ii) include any obligation to refund the first $100 of any unearned premium claim; and if the entry of an Order of Liquidation occurs on or after October 1, 1977 and before January 1, 1988, such obligations shall not: i) exceed $150,000, except that this limitation shall not apply to any workers compensation claims, or ii) include any obligation to refund the first $100 of any unearned premium claim; and if the entry of an Order of Liquidation occurs on or after January 1, 1988, such obligations shall not: (i) exceed $300,000, except that this limitation shall not apply to any workers compensation claims, or (ii) include any obligation to refund the first $100 of any unearned premium claim or to refund any unearned premium over $10,000 under any one policy. In no event shall the Fund be obligated to a policyholder or claimant in an amount in excess of the face amount of the policy from which the claim arises.

Amended by P.A. 84-1431, Art. 11, § 1, eff. Nov. 25, 1986; P.A. 85-576, § 1, eff. Sept. 18, 1987.

Title 18 U.S.C., Rule 23(c)

Trial

Rule 23. Trial by Jury or by the Court

(a) Trial by jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

(b) Jury of less than twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in

writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences.

(c) **Trial without a jury.** In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

(Dec. 26, 1944, eff. Mar. 21, 1946, as amended Feb. 28, 1966, eff. July 1, 1966; Apr. 26, 1976, eff. Oct. 1, 1977 Act July 30, 1977, P.L. 95-78, § 2(b), 91 Stat. 320, eff. Oct. 1, 1977.)

Title 18 U.S.C. § 1341

Frauds And Swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(June 25, 1948, ch. 645, 62 Stat. 763; May 24, 1949, ch. 139, § 34, 63 Stat. 94; Aug. 12, 1970, Pub. L. 91-375, § (6)(j)(11), 84 Stat. 778.)

Title 28 U.S.C. § 2106

Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

(June 25, 1948, c. 646, 62 Stat. 963.)

Title 28 U.S.C. § 2241

Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process,

judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 112, 63 Stat. 105; Sept. 19, 1966, Pub.L. 89-590, 80 Stat. 811.

Title 28 U.S.C. § 2255

Federal Custody; Remedy On Motion Attacking Sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence,

or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(June 25, 1948, c. 646, § 1, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105.)